



**Working Group on Bribery in
International Business Transactions**

Compilation of Recommendations made in the Phase 2 Reports

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DAF
Anti-corruption Division

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Argentina (June 2008)

The Working Group appreciates the significant efforts by Argentina to address a number of concerns expressed by the Working Group in Phase 1. The Working Group also acknowledges the generally very good cooperation of the Argentine authorities throughout the Phase 2 process.

The Working Group has two overriding concerns in relation to Argentina's implementation of the Convention. First, Argentina has not adopted liability of legal persons for foreign bribery as required by Article 2 and 3 of the Convention. The Working Group is seriously concerned about the lack of any progress with regard to this issue since Phase 1 and strongly urges Argentina to proceed as promptly as possible to adopt legislation providing for both liability and sanctions on legal persons that fully complies with the Convention. Second, for a number of reasons, it appears that Argentina is rarely able to effectively investigate and prosecute serious economic crimes to a resolution on the merits, in particular because of lengthy delays in getting to a decision due, *inter alia*, to the applicable rules of procedural law. In addition, certain allegations of foreign bribery that appeared in the public domain in 2002 were not investigated until 2006. These issues raise fundamental concerns, but the Working Group notes that the Argentine government has commenced reform to improve the federal criminal justice system. A new draft Criminal Procedure Code, based on an accusatorial system, was recently published by a commission mandated by the Ministry of Justice.

In this context, the Working Group will conduct a supplementary Phase 1 bis review of Argentina one year from now to evaluate Argentina's efforts with regard to corporate liability and sanctions, and to establishing nationality jurisdiction in foreign bribery cases. The review will also report on the status of legal changes with regard to broad criminal procedure and institutional reform (Recommendation 3(c)). Depending on its conclusions concerning progress in these areas (as well as with regard to its specific recommendations below), the Working Group will also decide whether to conduct a supplementary on-site evaluation (Phase 2 bis review) of Argentina or take other appropriate action.

Based on its findings regarding Argentina's implementation of the Convention and the Revised Recommendation, the Working Group also (1) makes the following recommendations to Argentina under part I; and (2) will follow up the issues in part II when there is sufficient relevant practice.

I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Argentina:

- a) provide further training to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that can play an important role preventing and detecting foreign bribery by Argentine companies active in foreign markets, including trade promotion and diplomatic personnel and tax inspectors (Revised Recommendation, Paragraph I);
- b) provide support for private sector initiatives such as seminars, conferences and technical assistance targeted at the business sector on foreign bribery issues, and, in cooperation with business and other relevant organisations, assist companies in engaging in preventive efforts (Revised Recommendation, Paragraph I);
- c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I);
- d) require BICE to adopt, and ensure CASCE adopts, anti-bribery policies with regard to export credit operations; and seriously consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (Revised Recommendation, Paragraph I).

2. With respect to the detection and reporting of suspected foreign bribery to the competent authorities, the Working Group recommends that Argentina:

- a) remind public officials, including diplomatic missions, trade promotion, export credit and tax administration personnel, of their obligation under art. 177(1) CPC and art. 2 of the Reporting Decree to report alleged offences of foreign bribery directly to competent law enforcement officials; ensure that administrative reporting duties laid down in other instruments reflect and are compatible with the CPC and Reporting Decree; and consider whether sanctions for non-reporting of alleged foreign bribery are appropriate and effective (Revised Recommendation Paragraph I);
- b) adopt comprehensive measures to protect public and private sector whistleblowers in order to encourage employees to report suspected cases of foreign bribery without fear of retaliation. (Revised Recommendation Paragraph I).

Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Argentina:

- a) continue and accelerate its efforts to address systemic deficiencies in enforcement with regard to serious economic crime such as foreign bribery (Convention, Article 5; Revised Recommendation Paragraph I);
- b) take all necessary measures to ensure that foreign bribery allegations are promptly detected, investigated and prosecuted as appropriate (Convention, Article 5, Revised Recommendation Paragraphs I and II);

- c) ensure that adequate resources, including specialised and experienced investigative judges, are made available for foreign bribery investigations and prosecutions; and take measures to provide increased continuity of investigative personnel for particular cases, including judges and prosecutors, to the greatest degree possible (Convention, Article 5; Revised Recommendation Paragraph I);
 - d) ensure that factors listed in Article 5 of the Convention do not influence investigation or prosecution in foreign bribery cases; and consider further measures to limit the disclosure of confidential information about individual cases to government agencies or officials not involved in the investigation (Convention, Article 5; Revised Recommendation Paragraph I);
 - e) review applicable rules to ensure that *incidentes* and appeals can be efficiently resolved in complex foreign bribery cases, and provide adequate training to judges and prosecutors concerning the management of such cases (Convention, Article 5; Revised Recommendation Paragraph I);
 - f) accelerate efforts to create an effective national register of information relating to all Argentine companies (Revised Recommendation Paragraphs I, II);
 - g) ensure tax information continues to be promptly provided to judges in appropriate cases (Revised Recommendation Paragraphs I, II).
4. With respect to the offence of foreign bribery, the Working Group recommends that Argentina:
- a) introduce an autonomous definition of foreign public officials;
 - b) ensure that this definition covers, in a manner consistent with the Convention, officials of foreign public enterprises and public officials of organised foreign areas or entities that do not qualify or are not recognised as States; and
 - c) ensure that vagueness with regard to the requirement that the advantage supplied by the bribery be “undue” is eliminated. (Convention, Article 1)
5. With respect to the liability of legal persons for foreign bribery, the Working Group recommends that Argentina adopt legislation on a priority basis to ensure that legal persons can be held liable for foreign bribery. (Convention, Articles 2 and 3)
6. With respect to jurisdiction, the Working Group recommends that Argentina adopt nationality jurisdiction in foreign bribery cases in order to strengthen enforcement of the offence. (Convention, Article 4)
7. With respect to the limitations period for prosecuting foreign bribery, the Working Group recommends that Argentina ensure that the statute of limitations applicable to the foreign bribery offence and possibilities for interruption and suspension allow for an adequate period of time for the investigation of the offence. (Convention, Article 6)
8. With respect to mutual legal assistance, the Working Group recommends that Argentina:
- a) ensure it can grant all MLA requests submitted in the context of criminal proceedings within the scope of the Convention and brought by a Party against a legal person; and

- b) consider steps that would allow it to grant MLA requests for coercive measures in the context of non-criminal proceedings within the scope of the Convention and brought by a Party against a legal person. (Convention, Article 9)

9. With respect to sanctions for foreign bribery, the Working Group recommends that Argentina:

- a) amend the law to provide that legal persons shall be subject to effective, proportional and dissuasive sanctions for foreign bribery, including fines or monetary sanctions (Convention, Articles 2, 3);
- b) take all necessary measures to ensure that seizure and confiscation can be effectively applied against the active briber, including against all legal persons that benefit from foreign bribery (Convention, Article 3);
- c) consider steps to ensure that the sanctions imposed by courts in foreign bribery cases are effective, proportionate and dissuasive (Convention, Article 3; Revised Recommendation Paragraph I);
- d) extend the grounds for debarment from public tenders to cover all offences falling within the scope of Article 1 of the Convention, ensure the effectiveness of the exclusion mechanism and, in conjunction with reform of the liability of legal persons for bribery, extend the disqualification to legal persons engaged in foreign bribery where appropriate (Convention, Article 3; Revised Recommendation Paragraph VI).

10. With respect to accounting, auditing and internal controls relating to the fight against foreign bribery, the Working Group recommends that Argentina:

- a) continue to strengthen accounting standards, take measures to enforce the accounting fraud offence and accounting requirements more effectively in bribery cases, and increase applicable sanctions where appropriate (Convention, Article 8; Revised Recommendation Paragraph V.A);
- b) consider whether requirements to submit to external audit are adequate, in particular with regard to large companies; and continue efforts to improve audit quality standards, including with regard to certification, independence and quality control (Revised Recommendation Paragraph V.B);
- c) ensure that auditors and *síndicos* are required to report all suspicions of foreign bribery by employees or agents of the company to management and, as appropriate, to corporate monitoring bodies; and consider requiring auditors and *síndicos*, notably in the face of inaction after appropriate disclosure within the company, to promptly report suspicions to the competent authorities (Revised Recommendation Paragraph V.B).

11. With respect to related tax offences and obligations, the Working Group recommends that Argentina take appropriate measures to make explicit the prohibition on deducting foreign bribes from taxable revenue either in tax legislation or in another manner that is binding and publicly available. (Revised Recommendation Paragraphs I, II and IV)

12. With respect to related anti-money laundering obligations, the Working Group recommends that Argentina maintain ongoing efforts for the improvement of the anti-money laundering regime, and, in this context:

- a) include foreign politically exposed persons, appropriately defined, in the definition of politically exposed persons in relevant rules and guidelines, and raise awareness about foreign bribery as a predicate offence to money laundering (Convention, Article 7; Revised Recommendation Paragraph I);
- b) extend money laundering reporting, due diligence and record keeping obligations to lawyers, *síndicos* and other legal professionals (subject to appropriate qualifications) (Convention, Article 7; Revised Recommendation Paragraph I);
- c) consider expanding the money laundering offence to include self-laundering (Convention, Article 7).

II. Follow-up by the Working Group

13. The Working Group will follow up on the issues below, as practice develops, in order to assess:
- a) the application of sanctions against natural and legal persons in foreign bribery cases (Convention, Article 3)
 - b) the application of territorial jurisdiction in foreign bribery cases (Convention, Article 4)
 - c) whether the solicitation or “illicit demand” of an undue payment or other advantage by a foreign public official can exclude the liability of the active briber (Convention, Article 1)
 - d) the application in practice of art. 258 bis PC, including its application to cases where a bribe is paid for an act/omission outside of the official’s authorised competence (Convention, Article 1)
 - e) whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred (Convention, Article 7)
 - f) whether Argentine authorities consider the factors listed in Article 5 of the Convention when denying extradition or MLA in a foreign bribery case (Convention, Articles 5, 9)
 - g) the time needed to reach a final decision in extradition procedures related to corruption cases (Convention, Article 10)
 - h) the functioning of the modified Judicial Council with regard to any disciplinary proceedings arising out of foreign bribery cases (Convention, Article 5).

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/35/28/40975295.pdf>

Report on progress since June 2008:

<http://oecd.org/dataoecd/38/4/46057339.pdf>

Australia (January 2006)

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Australia, the Working Group (i) makes the following recommendations to Australia, and (ii) will follow-up certain issues when there has been sufficient practice.

I. Recommendations

Recommendations for Ensuring Effective Prevention, Detection and Investigation of Foreign Bribery

1. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by:

- a) further promoting awareness within the Commonwealth public service,
- b) continuing efforts to raise the awareness of the private sector, including the distinction between bribery and facilitation payments and the record-keeping requirement for the defence of facilitation payments,
- c) paying special attention to raising the awareness of SMEs through, for instance, Australian diplomatic and trade missions in foreign countries, and
- d) raising the awareness of cash dealers of the foreign bribery offence as a predicate offence for the offence of money laundering, and providing them with guidance on identifying suspicious transactions.

2. Concerning the detection and investigation of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- a) it is clarified in the publicly available explanatory document on the Case Categorisations Prioritisation Model (CCPM), that implementation of the Convention is to be given “high priority”;
- b) the AFP undertakes evaluations where appropriate of the veracity of allegations of foreign bribery involving Australian nationals and companies contained in (i) media reports from credible sources, (ii) publicly available court documents filed in foreign countries, and (iii) requests to Australia from foreign countries for mutual legal assistance;
- c) Australia clarify that all cases of foreign bribery be referred to the AFP by Commonwealth agencies;
- d) the process be revised under the National Guidelines for Referring Politically Sensitive Matters to the AFP so that referrals of politically sensitive cases of foreign bribery to the AFP are not potentially delayed by notification to the Minister of Justice and Customs, and
- e) the AFP take the following steps to ensure the effective transmission of information to it about foreign bribery cases: (i) enter into a formalized agreement with the Australian Prudential Regulation Authority (APRA) concerning areas of overlapping jurisdiction respecting foreign bribery, and (ii) consider establishing measures such as MOUs to ensure the direct referral of

foreign bribery cases by State and Territorial police and anti-corruption bodies to the AFP even where a State or Territorial law establishes a bribery offence broad enough to cover foreign bribery. (Convention, Art. 5; Commentary 27; Revised Recommendation I, II)

3. Concerning the prevention and detection of foreign bribery through measures for disallowing the tax deductibility of bribe payments to foreign public officials, the Working Group recommends that the Australian Taxation Office (ATO):

- a) consider revising its Compliance Program to specifically include bribe payments to foreign public officials in their risk profile; and
- b) issue as soon as possible the bribery awareness audit guidelines that it is currently drafting on identifying bribe payments to foreign public officials and determining whether a particular payment meets one of the defences, and include within the bribery awareness audit guidelines a requirement that tax auditors report all information regarding foreign bribery to the Serious Non Compliance Business Line (SNC). (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

4. Concerning other measures for preventing and detecting foreign bribery, the Working Group recommends that Australia:

- a) should require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies, and consider requiring external auditors to report indications of a possible illegal act to the competent authorities; (Revised Recommendation V.B.iii, iv)
- b) consider taking appropriate measures to ensure that members of the Australian Public Service who come into contact with companies involved in international business understand that the Australian Public Service Code of Conduct requires Commonwealth officials to report to the AFP credible evidence of foreign bribery offences that they uncover in the course of performing their duties, encourage and facilitate such reporting, and consider strengthening reporting provisions, such as those included in the Department of Foreign Affairs and Trade (DFAT) Overseas Code and Export Finance and Insurance Corporation (EFIC) internal rules; (Revised Recommendation I)
- c) ensure that AusAID staff are aware of the policy for responding to indications of foreign bribery in relation to ODA contacts, including the reporting of such indications to the AFP, amend the standard contract with AusAID to clarify that the Contractor shall not engage in foreign bribery in relation to the execution of the contract, and ensure that contracts with subcontractors contain a similar prohibition; (Revised Recommendation I, VI. iii) and
- d) consider reviewing the Commonwealth whistleblower provisions in the context of the on-going review on this subject to ensure effective whistleblower protections for Commonwealth officials and staff of Commonwealth agencies who report suspicions of foreign bribery, and consider introducing stronger whistleblower protections for private sector employees who report suspicions of foreign bribery. (Revised Recommendation I)

Recommendations for Ensuring Effective Prosecution and Sanction of Foreign Bribery and related Offences

5. Concerning the implementation of the offence of bribing a foreign public official under the Commonwealth Criminal Code, the Working Group recommends that Australia:

- a) clarify that the foreign bribery offence applies regardless of the results of the conduct or the alleged necessity of the payment; (Convention, Art. 1; Commentary 7)
 - b) carry out its undertaking to amend as soon as possible the defence for conduct that is “lawful” in the foreign public official’s country to ensure consistency with Commentary 8 on the Convention; (Convention, Art. 1; Commentary 8) and
 - c) carry out the undertaking to revise the existing publicly available guidance document on the foreign bribery offence as soon as possible to clarify the defence of facilitation payments. (Convention, Art. 1; Commentary 9)
6. Concerning the sanctions for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:
- a) increase the fine for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia; (Convention, Art. 3.1)
 - b) with respect to companies that have been convicted of foreign bribery (i) consider introducing formal rules on the imposition of civil or administrative sanctions upon legal persons and individuals convicted of foreign bribery, so that public subsidies, licenses, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied or terminated, including through the provisions of the relevant contracts, as a sanction for foreign bribery in appropriate cases, and include provisions for the termination of such contracts in appropriate cases; and (ii) consider establishing a policy for denying access to contracting opportunities with public agencies, such as the public procurement agencies, EFIC and AusAID, as well as including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after entering the contract; (Convention, Art. 3.4; Revised Recommendation II.v, VI ii) and
 - c) continue compiling statistics on the offence of money laundering, including the level of sanctions and the confiscation of proceeds of crime. (Convention, Art. 7)
7. Concerning the discretion to prosecute the offence of bribing a foreign public official, the Working Group recommends that Australia clarify that the Guidelines on the Prosecution Policy of the Commonwealth prohibits consideration of the factors listed in Article 5 of the Convention. (Convention, Art. 5)

II. Follow-Up by the Working Group

8. The Working Group will follow-up the following issues once there has been sufficient practice:
- a) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code; (Convention, Art. 1; Commentary 9)
 - b) the application of the tax deduction for facilitation payments; ((1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)
 - c) application of the criminal liability of legal persons for the bribery of foreign public officials; (Convention, Art. 2)

- d) the choice of proceeding with foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive, as well as the sanctions imposed on natural persons for foreign bribery, to determine whether monetary sanctions, including fine penalties and confiscation, are imposed where appropriate; (Convention, Art. 3.1, 5)
- e) whether in practice Australia's capacity to provide mutual legal assistance in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence (The Working Group notes that this is a horizontal issue affecting many Parties.); and (Convention, Art. 9.1)
- f) the use of false accounting offences under the Corporations Act, including the level of sanctions. (Convention, Art. 8.1, 8.2)

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/57/42/35937659.pdf>

Report on progress since January 2006:

<http://oecd.org/dataoecd/37/4/41305864.pdf>

Austria (February 2006)

The Working Group welcomes Austria's recent efforts with regard to the introduction of criminal liability of legal persons and the fact that the law will enter into force on 1 January 2006. The Working Group notes that as of the time of the on-site visit, Austria had not yet established liability of legal persons for the offence of foreign bribery as required by the Convention. The lead examiners and the Working Group were accordingly unable to review the practical operation of such liability, as is contemplated in the Phase 2 process. The Working Group will assess the practical application of the new law both in the context of normal Phase 2 follow up procedures and once there has been sufficient practice.

Based on its findings regarding Austria's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the following recommendations to Austria under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Austria:

- a) take measures, including appropriate training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Austrian companies that are active in foreign markets, including trade promotion, export credit and development aid agencies (Revised Recommendation, Paragraph I);
- b) take further action to effectively improve awareness among companies, and in particular small and medium sized companies active in foreign markets, of the legislation regarding foreign bribery and of the government's intention to enforce it, and to assist companies in their efforts to prevent foreign bribery (Revised Recommendation, Paragraph I);
- c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I).

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Austria:

- a) establish procedures to be followed by employees of export credit, trade promotion and development aid agencies for reporting credible evidence of bribery of foreign public officials to competent prosecution authorities, and ensure that preventive anti-bribery clauses are applied by subsidiaries of OeKB (Revised Recommendation, Paragraph I);

- b) take measures to facilitate the reporting of suspicions of foreign bribery by private sector employees, including clarifying the effect of section 86 CPC and considering steps to better protect from retaliatory action employees who report in good faith suspicious facts involving foreign bribery (Revised Recommendation, Paragraph I);
- c) strengthen efforts to provide guidance to entities subject to money laundering reporting obligations in relation to foreign bribery and further assess and supervise the reporting practices of relevant entities; (Revised Recommendation, Paragraph I);
- d) require auditors to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and consider requiring auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities (Revised Recommendation, Paragraph V.B).

Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Austria:

- a) monitor and evaluate the performance of investigation and prosecution agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation, and including in order to ensure that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved do not influence the investigation or prosecution of foreign bribery cases (Convention, Article 5; Revised Recommendation, Paragraph I);
- b) take all necessary measures to ensure that Austria does not decline to render mutual legal assistance (MLA) in foreign bribery cases on the ground of bank secrecy, take all appropriate measures to ensure the provision of MLA in foreign bribery cases without undue delay, and consider developing methods to collect statistics regarding MLA while maintaining the efficiency of a decentralized system (Convention, Articles 9(1), 9(3));
- c) ensure that the necessary resources, including specialized expertise, are made available to prosecutors for the effective investigation and prosecution of the foreign bribery offence (Convention, Article 5; Revised Recommendation, Paragraph 1);
- d) take appropriate measures to ensure (i) that all bribes offered, promised or given to a foreign public official for any use of the official's position, whether or not within the official's authorised competence, constitute the basis for a foreign bribery offence; and (ii) that a foreign public official's acceptance of an undue advantage exceeding a small facilitation payment is deemed contrary to the official's duties and would therefore constitute the basis for an active foreign bribery offence (Convention, Article 1);
- e) issue and publicize guidelines to prosecutors clarifying that prosecution of allegations of bribery of foreign public officials by legal persons is always required in the public interest under the new law on the criminal liability of legal persons, subject only to clearly defined exceptions, and develop guidelines with regard to organisational measures for business with regard to the fight against bribery (Convention, Articles 2, 3, 5); and

- f) provide appropriate training to judges and law enforcement personnel, including prosecutors and the staff of the Federal Criminal Investigation Office (BKA), with respect to the investigation, prosecution and adjudication of foreign bribery cases (Revised Recommendation, Paragraph I).

4. With respect to related accounting/auditing and tax offences and obligations, the Working Group recommends that Austria:

- a) ensure that its law and practice adequately sanction accounting omissions, falsifications and fraud relating to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws and whether such sanctions are capable of being imposed on legal persons (Convention, Article 8); and
- b) revise the Guidelines on income tax so that they accurately reflect the applicable law, and provide training with regard to the relevant criminal law provisions to tax officials (Revised Recommendation, Paragraph IV).

5. With respect to sanctions, the Working Group recommends that Austria:

- a) increase the criminal sanctions applicable to foreign bribery and in particular to serious cases in order to provide for effective, proportional and dissuasive sanctions (Convention, Article 3(1));
- b) take all necessary measures to ensure that legal persons that engage in foreign bribery are subject to effective, proportionate and dissuasive criminal penalties, including in cases where the legal person may not have generated significant profits over the relevant period (Convention, Articles 2, 3(1));
- c) take appropriate measures to ensure that diversion and non-punishment pursuant to section 42 PC are excluded at least in all serious cases of foreign bribery (Convention, Article 3);
- d) compile statistics with regard to cases brought and types of sanctions imposed with regard to money laundering and accounting offences (Convention, Articles 7, 8).

II. Follow-up by the Working Group

6. The Working Group will follow up on the issues below, as practice develops, in order to assess:

- a) with respect to the expected entry into force of the law on the liability of legal persons, the application of the law as it applies to foreign bribery with regard to (i) liability generally and in particular liability in cases of foreign bribery involving agents; (ii) sanctions generally (Convention, Articles 2, 3); (iii) the application of nationality jurisdiction to legal persons (Convention, Article 4); (iv) the availability of MLA in criminal cases against legal persons (Convention, Article 9);
- b) the application of the foreign bribery provisions as case law develops, including with regard to the autonomy of the offence from any requirement of proof of the law of the foreign public official's country, the definition of "foreign public official" and the question of bribery through intermediaries (Convention, Article 1);

- c) the enforcement of accounting and auditing obligations (Convention, Article 8); and the implementation of anti-corruption policies by the Austrian Development Agency and export credit agencies.

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/16/22/36180957.pdf>

Report on progress since February 2006:

<http://oecd.org/dataoecd/55/57/40656709.pdf>

Belgium (June 2005)

Consequently, based on the findings of the Working Group with respect to Belgium's implementation of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Belgium. In addition, the Working Group recommends that certain issues should be re-examined as the case law evolves.

I. Recommendations

Recommendations to ensure the effectiveness of measures to prevent and detect the bribery of foreign public officials

1. With respect to awareness-raising efforts to promote the OECD Convention and prosecution of the offence of bribery of foreign public officials under Belgian anti-corruption law, the Working Group recommends that Belgium:
 - a) develop its efforts to raise awareness of the offence of bribery of foreign public officials within the administration and in the quasi-governmental sector, particularly for those employees likely to play a part in the detection and reporting of acts of transnational bribery, and those coming into contact with Belgian businesses exporting or investing abroad, as well as with the Belgian public (Revised Recommendation, Section I).
 - b) take the necessary measures, in cooperation with the professional organisations and sectors of the economy concerned, to increase private sector awareness of the offence of bribery of foreign public officials, and to promote and assist in the implementation of preventive organisational measures within businesses present in foreign markets (Revised Recommendation, Sections I and V C. (i)).
2. With respect to other measures of prevention, the Working Group recommends that Belgium:
 - a) examine the principles and procedures in force in all the bodies and authorities responsible for granting public subsidies, public procurement contracts or other advantages awarded by public authorities, in order to ensure that there is a fully efficient system for refusing such advantages to enterprises determined to have bribed foreign public officials (Revised Recommendation, Sections II v) and VI).
3. With respect to detection, the Working Group recommends that Belgium:
 - a) adopt measures to ensure that employees who in good faith denounce suspected acts of bribery are given effective and adequate protection so that they can report those acts to the prosecuting authorities without fear of being dismissed or taken to court (Revised Recommendation, Section I).
 - b) remind public officials, through a circular or other means, of their obligation under Article 29, paragraph 1 of the Criminal Investigation Code to inform the prosecuting authorities of any offence of bribery of foreign public officials that comes to their knowledge in the performance of their functions, and examine the appropriateness of instituting a comprehensive system of

sanctions for non-compliance with this obligation (Revised Recommendation, Sections I and II(v)).

- c) prepare a circular as soon as possible for all tax officials, reminding them of the general prohibition, under criminal law, on giving any kind of advantage to a foreign public official (Convention, Article 1; Revised Recommendation, Section IV).
- d) clarify the requirement that auditors of company accounts who uncover evidence of possible acts of bribery must inform management and, as appropriate, the corporate monitoring bodies of the company, and consider making it an express legal obligation for auditors to report to the prosecuting authorities any involvement of the company whose accounts they audit in acts of bribery in foreign markets, in cases where the auditor has duly notified the corporate bodies concerned but they have failed to act (Convention, Article 8; Revised Recommendation, Section V iv)).
- e) set up multidisciplinary coordination among the different judicial and police departments, accompanied by a memorandum of understanding with the public services, with regard to the control and detection of bribery of public officials (Revised Recommendation, Section I).

Recommendations to ensure the effective prosecution of the offence of bribery of foreign public officials and related offences

4. With respect to prosecution, the Working Group recommends that Belgium:

- a) formally clarify, by circulars or any other official means, its criminal policy with regard to active bribery of foreign public officials, to encourage police and prosecutors to systematically seek to establish the liability of persons suspected of having committed the offence (Revised Recommendation, Section I).
- b) carry out an adequate training policy for those involved in criminal proceedings (police, prosecutors and examining magistrates) for the offence and establish a specialised branch to deal with economic and financial crime cases (Revised Recommendation, Section I; Annex to the Revised Recommendation, Paragraph 6).
- c) define an autonomous notion of foreign public official that fully complies with the requirements of the Convention and, with the same aim, take remedial legislative measures to ensure the full effectiveness of Belgium's extra-territorial and universal jurisdictions over bribery of foreign public officials committed outside Belgium (Convention, Article 1; Phase 1 Evaluation; Convention, Articles 4 and 5).
- d) clarify, within the framework of the bill currently being drafted to amend the law concerning the criminal liability of legal persons, how the mental element is imputed for the intentional offence of transnational bribery, in order to facilitate prosecution (Convention, Articles 2 and 3; Revised Recommendation, Section I).
- e) ensure, as part of the ongoing reform of mutual legal assistance in criminal matters, on the one hand, that simplified national procedures are introduced for active and passive mutual assistance in the absence of an international agreement (Convention, Article 9); and, on the other hand, that it is clarified that invoking Belgium's essential interests to deny mutual legal assistance in cases of foreign bribery will not be influenced by the considerations mentioned in Article 5 of the Convention (Convention, Article 5).

5. With regard to sanctions, the Working Group recommends that Belgium:

- a) draw the attention of prosecutors to the importance of vigorously pursuing accounting violations that could conceal the payment of a bribe to a foreign public official (Convention, Article 3; Revised Recommendation, Section V A) iii)).
- b) consider, either as part of the revision of the law on criminal liability of corporations or by any other means, the disqualification by law from public procurement of enterprises that are convicted of bribery of foreign public officials, (Convention, Article 3; Revised Recommendation, Section VI ii)).
- c) introduce expeditiously into Belgian tax law a general prohibition on the tax deductibility of any kind of advantage given to a foreign public official (Phase 1 Report; Revised Recommendation, Sections II vii) and IV).

II. Follow-up by the Working Group

6. The Working Group will follow up the following issues, in the light of developments in case law and practice, in order to verify:

- a) whether the current definition of bribery under Article 246 of the Criminal Code specifically covers the giving of an advantage (Convention, Article 1).
- b) whether the treatment of the offence of bribery of a foreign public official confirms that the notion of the exercise of the official functions of a public official is broadly conceived (Convention, Article 1).
- c) whether the human and material resources allotted to the federal police and their attribution allow for effective prosecution of complex cases of foreign bribery (Revised Recommendation, Section I).

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Brazil (December 2007)

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Brazil, the Working Group (i) makes the following recommendations to Brazil, and (ii) will follow-up certain issues when there has been sufficient practice.

I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to prevention, awareness raising and training activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that Brazil:

- a) Pursue its efforts to raise the level of awareness of and provide training on the foreign bribery offence within the public administration, notably among diplomatic representations, trade promotion, export credit and development aid agencies, as well as other public institutions involved with Brazilian companies operating abroad (Revised Recommendation, Paragraph I);
- b) Significantly step up efforts, in cooperation with business organisations and other civil society stakeholders, to improve awareness of the foreign bribery offence among companies, and in particular small and medium size companies, active in foreign markets, and advise and assist companies with regard to the prevention and reporting of foreign bribery (Revised Recommendation, Paragraph I); and
- c) With respect to export credits, (i) take necessary measures to raise awareness of the foreign bribery offence among staff of the Brazilian Development Bank (BNDES); (ii) ensure that applicants requesting export credit support are made expressly aware of the foreign bribery offence and its legal consequences; (iii) put in place due diligence procedures to verify that applicants are not engaging in acts of bribery; and (iv) consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits. A similar approach should be considered in the context of infrastructure projects and any aid funded procurement contracts run by BNDES (Revised Recommendation, Paragraphs I, II.v and VI.iii).

2. With respect to the detection and reporting of the foreign bribery offence and related offences to the competent authorities, the Working Group recommends that Brazil:

- a) Adopt comprehensive measures to protect public and private sector whistleblowers in order to encourage those employees to report suspected cases of foreign bribery without fear of retaliation (Revised Recommendation, Paragraphs I and V.C.iv);
- b) Regularly remind Brazilian public officials (particularly those in diplomatic representations, the tax administration, and in trade promotion, export credit and development aid agencies, as well as in other public institutions involved with Brazilian companies operating abroad)

of their obligation to report instances of foreign bribery, and encourage and facilitate such reporting (Revised Recommendation, Paragraph I);

- c) Take additional measures to encourage Brazilian businesses active in foreign markets (i) to implement adequate internal company controls and standards of conduct, with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; (ii) to develop monitoring bodies (such as audit committees) that are effective and independent from management; and (iii) to make statements in their annual reports about their internal compliance programs for the prevention and detection of foreign bribery (Revised Recommendation, Paragraphs I, II.iii and V.C);
- d) With regard to accounting and auditing, (i) work with the accounting and auditing professions to raise awareness of the foreign bribery offence and encourage the detection and reporting of suspected instances of foreign bribery; (ii) require external auditors to report all indications of possible acts of foreign bribery to company management and, as appropriate, to corporate monitoring bodies; (iii) consider requiring external auditors to report such suspicions to the competent law enforcement authorities; and (iv) consider enactment of legislative reforms that would require all large Brazilian companies (whether listed or unlisted) to submit to an external audit (Revised Recommendation, Paragraphs I, II.iii and V.B); and
- e) With regard to money laundering and foreign bribery, ensure that the institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Council of Control of Financial Activities (COAF) itself, receive appropriate directives and training (including typologies) on the identification and reporting of information that could be linked to foreign bribery; and proceed with the adoption of foreseen legislation which aims to extend money laundering reporting, due diligence and record keeping obligations and requirements to members of the legal and accounting professions (Convention, Article 7; Revised Recommendation, Paragraph I).

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Brazil:

- a) Ensure that sufficient resources are made available and that training is provided to relevant law enforcement authorities, including the Federal Police, State Police, and the Ministério Público Federal, for the effective detection and investigation of foreign bribery offences; and consider developing specialised prosecutors' offices to more effectively investigate and prosecute complex economic and financial crimes, including the foreign bribery offence (Convention, Article 5; Revised Recommendation, Paragraphs I and II);
- b) Take necessary measures to ensure that all credible foreign bribery allegations are proactively investigated, and remind the Federal Police and the Ministério Público Federal of the importance of actively looking into the range of possible sources of detection of foreign bribery (Convention, Article 5; Revised Recommendation, Paragraphs I and II); and
- c) Encourage law enforcement authorities to make full use of the broad range of investigative measures available to Brazilian investigative authorities, including special investigative

techniques and access to financial information, in order to effectively investigate suspicions of foreign bribery (Convention, Article 5; Revised Recommendation, Paragraphs I and II).

4. With respect to the liability of legal persons, the Working Group acknowledges the recent initiatives taken by Brazil in this area and recommends that Brazil (i) take urgent steps to establish the direct liability of legal persons for the bribery of a foreign public official; (ii) put in place sanctions that are effective, proportionate and dissuasive, including monetary sanctions and confiscation; and (iii) ensure that, in relation to establishing jurisdiction over legal persons, a broad interpretation of the nationality of legal persons is adopted (Convention, Articles 2, 3 and 4; Revised Recommendation, Paragraph I).

5. With respect to sanctions for foreign bribery, the Working Group recommends that Brazil:

- a) Take all necessary measures to provide that proceeds of foreign bribery can always be confiscated, including where they are in the hands of a third party not acting in good faith, and regardless of whether that third party is a natural or legal person, or that monetary sanctions of comparable effect are applicable (Convention, Article 3); and
- b) Pursue efforts to require agencies in charge of administering public funds and government contracts (including those responsible for export credit guarantees, public procurement and privatisation processes) to (i) take due consideration of prior convictions for foreign bribery offences in their contracting decisions and (ii) put in place due diligence procedures where there are suspicions that applicants or clients have been or are involved in payment of bribes to foreign public officials, with a view to suspending or withdrawing support (Revised Recommendation, Paragraphs I, II.v and VI).

6. With respect to related tax offences, the Working Group recommends that Brazil:

- a) Clarify the prohibition on the deductibility of bribes by introducing an express denial for foreign bribe payments either in the tax legislation or through another appropriate mechanism that is binding and publicly available (Revised Recommendation, Paragraph IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials); and
- b) Expressly communicate to tax inspectors the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, including commissions, bonuses and gratuities, through the issuance of guidelines or manuals, and training programmes (Revised Recommendation, Paragraph IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials).

II. Follow-up by the Working Group

7. The Working Group will follow up the issues below, as practice develops, in order to assess:

- a) The adequacy of the limitation period for completing criminal investigations in foreign bribery cases (Convention, Article 6);
- b) Brazil's ability to (i) provide prompt and effective mutual legal assistance for offences under the Convention; and (ii) provide and obtain mutual legal assistance in foreign bribery investigations involving legal persons (Convention, Article 9);
- c) Whether, in relation to extradition, (i) considerations of national economic interest, the potential effect on relations with another State and the identity of the person involved unduly influence decisions to grant or refuse extradition; and (ii) whether Brazil initiates

- prosecutions of its nationals in circumstances where extradition is refused (Convention, Articles 5 and 10);
- d) How jurisdiction is exercised over natural and legal persons when the offence takes place in part or wholly abroad (Convention, Article 4);
 - e) Whether the foreign bribery offence in the Penal Code (i) covers an act of bribery through an intermediary; (ii) covers any use of the public official's position, whether or not within the official's authorised competence; (iii) covers all elements of the definition of "foreign public official"; and (iv) effectively narrows the scope of the foreign bribery offence by linking the act or omission of the foreign public official to an international business transaction, contrary to Article 1 of the Convention (Convention, Article 1);
 - f) Whether the offence of "concessão" in article 316 of the Penal Code can be relied on in foreign bribery cases and could be used as a basis to preclude prosecution of a perpetrator for the offence of bribery of a foreign public official (Convention Articles 1 and 5);
 - g) Whether the sanctions, including confiscation measures, handed down by the courts for the offence of bribery of a foreign public official are effective, proportionate and dissuasive (Convention, Article 3);
 - h) The application of the money laundering offence where the predicate offence is foreign bribery, including (i) where the foreign bribery is committed abroad by a legal person; (ii) where the foreign bribery is committed in a country which does not criminalise this predicate offence; and (iii) the sanctions imposed (Convention, Article 7); and
 - i) The effective prohibition in Brazilian company law of offences listed in Article 8.1 of the Convention (Convention, Article 8; Revised Recommendation, Paragraph V).

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Bulgaria (June 2003)

In conclusion, based on the findings of the Working Group with respect to Bulgaria's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Bulgaria. In addition, the Working Group recommends that certain issues be revisited as case-law develops.

I. Recommendations

Recommendations for Ensuring Effective Mechanisms for Preventing and Detecting Foreign Bribery

1. With respect to awareness raising with a view to promoting the implementation of the anti-bribery legislation, the Working Group recommends that Bulgaria:
 - a) Take measures to raise the level of awareness of the foreign bribery offence among officials in government agencies that could play a role in detecting and reporting it and undertake effective public awareness activities for the purpose of educating and advising the private sector on the offence. (Revised Recommendation, Article I)
 - b) Develop the role of the Bulgarian Trade Promotion Agency in awareness-raising and in deterrence, by considering measures which prevent public funds being spent on assistance, or official support given, to companies involved in foreign bribery. (Revised Recommendation, Article I)
 - c) Work proactively with the accounting, auditing and legal professions to establish training and awareness-raising activities about the foreign bribery offence in order to maximise the opportunities for prevention and deterrence within the business community. (Revised Recommendation, Article I).
 - d) Maintain statistics as to the number, sources and subsequent processing of allegations of violations of the laws against foreign bribery and consider ways of making sufficient information available as a matter of public record on cases of bribery heard by the courts, including acquittals, convictions and interpretations of the law, to meet the needs of judges, lawyers and those engaged in research, as well as the media and the public. (Revised Recommendation, Article I).
2. With respect to other preventive measures, the Working Group recommends that Bulgaria:
 - a) Encourage the introduction of codes of conduct and compliance policies in corporations. (Revised Recommendation, Article VI).
 - b) Consider operating a policy of excluding any individuals, or any entities whose directors or officers have been found to have been involved in foreign bribery from eligibility for government contracts (Convention, Article 3; Revised Recommendation, Article VI).
3. With respect to the reporting of foreign bribery to the appropriate authorities, the Working Group recommends that Bulgaria:

- a) Consider the introduction of measures of whistleblower protection sufficient to protect employees, both in the public and private sectors, from dismissal in order to encourage individuals to report suspected cases of foreign bribery without fear of retaliation. (Convention, Article 5).
 - b) Bearing in mind the vital role of accountants in uncovering and reporting foreign bribery, consider measures designed to encourage increased reporting by members of the profession; and consider requiring auditors to report indications of possible illegal bribery to the competent authorities. (Convention, Article 8, Revised Recommendation, Article V B 4).
 - c) Encourage the enforcement agencies to provide appropriate feedback on reports that are made, in order to assist the tax and other authorities in improving their detection and reporting capabilities with regard to foreign bribery. (Revised Recommendation, Articles I and II (ii)).
4. With respect to detection, the Working Group recommends that Bulgaria
- a) Provide all officials having a role in the detection, reporting and enforcement of the foreign bribery offence with detailed and regularly updated training about the content of the offence, and guidance, in the form of guidelines or typologies where appropriate, on the circumstances in which it occurs and how to recognise it. (Revised Recommendation, Article I)
 - b) Establish clear guidelines for the tax authorities to encourage the detection of foreign bribery, and consider introducing an express denial of deductibility in order to strengthen the mechanisms available for detecting and deterring the offence. (Revised Recommendation, Article IV).
 - c) Take steps to ensure that the officials responsible for processing requests for information under the Access to Public Information Act are properly trained so that information necessary for the detection and reporting of foreign bribery is available to the fullest extent allowed by that statute. (Revised Recommendation, Article I).

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Money-Laundering Offences

5. The Working Group noted Bulgaria's non-compliance with Article 2 of the Convention and therefore encourages it to proceed diligently with the recently instituted measures aimed at fulfilling the requirements of the Convention by establishing the liability of legal persons for the bribery of a foreign public official, and put in place sanctions that are effective, proportionate and dissuasive, including, in particular, confiscation in cases where the proceeds or assets are in the hands of a legal entity. (Convention, Articles 2, 3).

6. The Working Group recommends that Bulgaria:
- a) Consider putting in place a centralised mechanism for the periodic review and evaluation of the effectiveness of the enforcement efforts of the different agencies involved in the fight against foreign bribery. (Convention, Article 5).
 - b) Employ special investigative techniques in respect of the foreign bribery offence where needed, and: (i) ensure that they are available in cases involving requests to lift judicial immunity and (ii) clarify the procedures for applying for authorisation to use such techniques, in order to ensure that these are consistently applied and the time-limits respected. (Convention, Article 5).

- c) Examine the rules applicable to the lifting of bank secrecy in the course of financial investigations and the manner in which they are currently applied, to ensure that the process is simple and consistently implemented. (Convention, Articles 5, 9).
- d) Consider, within the constitutional principles of the State, measures that may be taken in order to ensure that judicial immunity does not impede effective investigation, prosecution and adjudication in foreign bribery cases. (Convention, Article 5).

II. Follow-up by the Working Group

7. The Working Group will follow up on the issues below, as the case-law on the foreign bribery offence develops, to assess:

- a) The application of sanctions, in particular the fines now available under Articles 304 and 305a of the Penal Code, in order to determine whether they are sufficiently effective, proportionate and dissuasive to deter and penalise the offence of foreign bribery. (Convention, Article 3).
- b) Whether the existing language defining the elements of the offence of foreign bribery is sufficiently clear to be used in practice in cases where a benefit is directed to a third party. (Convention, Article 1).

8. The Working Group will furthermore monitor developments in the following area:

- a) Whether the proposed Law on the Amendment and Supplements to the Law on Measures Against Money Laundering is passed by the National Assembly (Convention, Article 8).

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<http://www.oecd.org/dataoecd/8/19/2790505.pdf>

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Canada (March 2004)

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Canada, the Working Group (i) makes the recommendations to Canada under part 1, and (ii) will follow-up the issues in part 2 when there has been sufficient practice in Canada in respect of cases involving the bribery of foreign public officials.

I. Recommendations

Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

1. The Working Group recommends that, with respect to promoting awareness of the Convention and the CFPOA, Canada establish a more systematic and coordinated approach to promoting awareness, and increase efforts to promote awareness of the CFPOA in all the government agencies involved in the implementation of the CFPOA. (Revised Recommendation, Paragraph I)

2. Concerning the investigation and prosecution of cases involving the bribery of foreign public officials, the Working Group recommends that Canada consider establishing a coordinating role for one of the principal agencies responsible for the implementation of the CFPOA for purposes including the following: 1. Collecting information from the police and prosecutorial authorities at the federal and provincial levels about investigations and prosecutions to ensure that, for instance, resources are not duplicated where more than one authority has jurisdiction; and 2. Maintaining specialized knowledge on the CFPOA to be available to the provincial (and where applicable, municipal) authorities involved in the enforcement of the offence. (Revised Recommendation, Paragraph I)

3. With respect to the prevention and detection of the bribery of foreign public officials through accounting requirements, external audit and internal company controls, the Working Group recommends that Canada:

- a) Consider the introduction of amendments to the federal Canada Business Corporations Act (CBCA) to prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation, and consult with the provinces in an effort to ensure that the provincial legislation also meets these standards [Convention, Article 8.1; Revised Recommendation, Paragraph V. A. (i)]
- b) Review the relevant legislation in consultation with the provinces to consider: 1. whether the requirements to submit to an independent external audit are adequate, in view of the rule that permits large private corporations to exempt themselves from the requirement; and 2. broadening the prohibitions for participating in audits in order to improve auditor independence. [Revised Recommendation, Paragraphs V. B. (i) and (ii)]
- c) Consider requiring the auditor to report indications of foreign bribery to the competent authorities.¹ [Revised Recommendation, Paragraph V. B. (iv)]

¹ The Working Group notes that this is a general issue for many Parties.

- d) Encourage the development and adoption of adequate internal company controls, including standards of conduct. [Revised Recommendation, Paragraph V. C. (i)]

4. With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Canada:

- a) Consider clarifying the policy statements on reporting wrongdoing and illegal acts in the workplace with a clear statement that an employee may either follow the internal disclosure procedure or report an offence directly to the law enforcement authorities, and that there should be no administrative or disciplinary measures applied to an employee who, in good faith, does decide to report directly to the law enforcement authorities. (Revised Recommendation, Paragraph I)
- b) Issue specific instructions to foreign representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Canada.² (Revised Recommendation, Paragraph I)
- c) Review the prohibition under the federal Income Tax Act against reporting non-tax criminal offences detected in the course of tax audits performed by the Canadian Customs and Revenue Agency to the law enforcement authorities. (Revised Recommendation, Paragraph I)
- d) Review the disclosure policy and procedure of the Canadian International Development Agency (CIDA) and Export Development Canada (EDC) to ensure that there is disclosure to the law enforcement authorities or the Federal Prosecution Service of the Department of Justice, where, in the course of transacting business with a company, credible evidence arises that a violation of the CFPOA has occurred.³ (Revised Recommendation, Paragraph I)

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution and Sanctioning of Foreign Bribery Offences

5. The Working Group recommends that Canada:

- a) Consider issuing some form of guidance to assist in the interpretation of the exception under section 3 (4) of the CFPOA for facilitation payments. (Convention, Article 1; Commentary 9 to Convention)
- b) Consider amending the part of the definition of “business” in section 2 of the CFPOA that results in the requirement that the purpose of the bribe be for obtaining an advantage in the course of business for profit. (Convention, Article 1)
- c) Reconsider the decision to not establish nationality jurisdiction over the offence of bribing a foreign public official. In the event that Canada does not change its position, the Working Group recommends that this issue continue to be monitored. (Convention, Article 4.2 and 4.4; Phase 1 Evaluation)

2 The Working Group notes that this is a general issue for many Parties.

3 The Working Group notes that this is an issue for other Parties. This recommendation shall not be interpreted as a suggestion that the policies of EDC do not meet the standards set out in the Action Statement on Bribery and Officially Supported Export Credits.

- d) With respect to prosecutorial discretion and the guidelines in the FPS Deskbook, clarify that, in investigating and prosecuting the bribery of a foreign public official, there are no proper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved, and establish guidance to prosecutors on how to proceed when they decline to prosecute a case that potentially involves one of the public interest factors listed in the FPS Deskbook. (Convention, Article 5)
- e) Consider revisiting the policies of agencies such as Export Development Canada (EDC), the Canadian International Development Agency (CIDA) and Public Works and Government Services Canada (PWGSC) on dealing with applicants convicted of bribery and corruption, given that Canada does not impose additional civil or administrative sanctions upon a person or company convicted of the bribery of a foreign public official. [Convention, Article 3.4, Revised Recommendation, Paragraphs II v) and VI ii)]⁴
- f) Compile statistical information on the sanctions for the offence of bribing a foreign public official as well as related omissions and falsifications in respect of the books, records and accounts of companies, in a manner that differentiates between the sanctions for legal persons versus natural persons and includes information about the forfeiture of bribes and the proceeds of bribery. It is also recommended that Canada consider differentiating between the sanctions obtained through the plea-bargaining process and those obtained through ordinary trial proceedings (Convention, Article 3.1, 3.3 and 8.2).

II. Follow-up by the Working Group

6. The Working Group will follow-up the following issues once there has been sufficient practice under the CFPOA:

- a) Application of the revised law on the liability of legal persons [Bill C-45 “An Act to amend the Criminal Code (criminal liability of organizations)”], which was introduced in the House of Commons on 12 June 2003, to CFPOA cases. (Convention, Article 2; Phase 1 Evaluation)
- b) Application of the exception under section 3 (3) of the CFPOA for reasonable expenses incurred in good faith.
- c) Application of sanctions to natural and legal persons for offences under the CFPOA as well as related omissions and falsifications in respect of the books, records and accounts of companies. [Convention, Article 3.1, 3.3 and 8.2; Phase 1 Evaluation; Revised Recommendation, Paragraph V. A. (ii)]

7. In addition, the Working Group will follow-up implementation of the various initiatives¹ announced by the Government of Canada following the on-site visit.

⁴ This recommendation shall not be interpreted as a suggestion that the policies of EDC do not meet the standards set out in the Action Statement (of the OECD Working Party on Export Credits and Credit Guarantees) on Bribery and Officially Supported Export Credits.

NOTES

¹ Following the on-site visit, the Canadian authorities announced that it would be undertaking initiatives including the following:

- Ensure that the DFAIT media relations division has an accurate understanding of the CFPOA (in response to the release of erroneous information about the application of the CFPOA to the media).
- Amend the CIDA document “Anti-Corruption Programming: A Primer” to provide accurate information about the facilitation payments exception in the CFPOA
- RCMP will take steps to add the CFPOA to the list of offences for which it has the mandate to investigate in its PROOF document.
- The CCRA began developing a section in its Audit Manual to deal with the application of section 67.5 of the Income Tax Act as it relates to outlays and expenses incurred under section 3 of the CFPOA. As well, CCRA undertook to revise its Investigation Manual to include a reference to the CFPOA.
- Team Canada plans to add links on the CFPOA to its Export Source website and will refer to the CFPOA in the next edition of “Step-by-Step Guide to Exporting”.
- Awareness training sessions will be held in order to assist federal public servants in interpreting the two policy documents regarding the internal disclosure of information on offences committed by government officials.
- The Minister of Finance of Québec announced in the budget speech of 11 March 2003 that the Québec Income Tax Act would be amended to disallow payments for the purpose of doing anything that is an offence under section 3 of the CFPOA, and that the amendment would operate retroactively to the date the CFPOA came into force.
- In order to reinforce the practice that has evolved concerning the sharing of information about cases between the police agencies, the RCMP has undertaken to work with its partners to establish a protocol whereby police agencies would inform the RCMP about cases involving the CFPOA.
- The FPS Deskbook will be amended to reinforce the recommendation already contained therein about the recording of reasons for decisions to not prosecute.
- CIDA’s auditors are exploring the possibility of conducting joint audits with other donors to more effectively verify and trace the use of funds where an applicant has been convicted of bribery.
- The Government of Canada announced that on 12 June 2003 a Bill was introduced into Parliament [Bill C-46 “An Act to amend the Criminal Code (Capital Markets fraud and evidence-gathering)”], which, inter alia, 1. creates an offence of threatening or retaliating against employees who report unlawful conduct to the law enforcement authorities, and 2. establishes the authority for a justice or judge to issue general and specific production orders for the obtaining of documents from persons, including financial institutions, other than those under investigation.
- Establish a legislative and regulatory framework regarding the reporting by lawyers and legal firms of money laundering transactions to competent authorities.

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<http://www.oecd.org/dataoecd/20/50/31643002.pdf>

Report on progress since March 2004:

<http://www.oecd.org/dataoecd/5/6/36984779.pdf>

Chile (October 2007)

The Working Group is seriously concerned that as of the Phase 2 on-site visit in March 2007 Chile had not taken any steps to address the Working Group's Phase 1 recommendations with regard to the liability of legal persons, sanctions, jurisdiction, bank secrecy or the foreign bribery offence. While the Working Group notes that Chile has engaged in efforts to implement the Convention, it recommends, as set forth below, that Chile take prompt action in order to achieve full compliance with Articles 1, 2, 3, 4 and 9 of the Convention.

As discussed in the body of this report, the Working Group considers that Chile's expressed intent in the Phase 1 report to remedy several issues of non-compliance with the Convention as part of a general process of Penal Code reform has not been successfully achieved. The Working Group notes the still very preliminary nature of the Penal Code reform project and its uncertain future schedule and outcome.

In this context, the Working Group notes with interest Chile's efforts since the March 2007 onsite visit to prepare legislation with regard to sanctions on legal persons for foreign bribery outside of the context of Penal Code reform. It strongly urges Chile to proceed as promptly as possible to adopt legislation providing for both liability and sanctions on legal persons that fully complies with the Convention. With regard to the foreign bribery offence, sanctions generally and jurisdiction, the Working Group also notes that preliminary work by the National Group of Experts against Corruption (GNECC) to prepare draft legislation has begun since the on-site visit. The Working Group also strongly urges the prompt adoption of legislation in these areas, as well as in the area of bank secrecy.

Considering the seriousness of the situation it has observed in Chile, the Working Group will engage in an exceptional additional review of Chile's legislation (Phase 1bis) one year from now in parallel with Chile's oral follow up. This review will focus on Chile's implementation of Articles 1, 2, 3, 4 and 9 of the Convention and on Chile's efforts to address the corresponding recommendations below. The Group will also decide whether to conduct a supplementary on-site evaluation (Phase 2bis) of Chile in view of the reports that will be provided by the Chilean authorities in the context of the Group's monitoring work.

Based on its findings regarding Chile's implementation of the Convention and the Revised Recommendation, the Working Group also (i) makes the following recommendations to Chile under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Chile:

- a) take additional measures, including further training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that

interact with Chilean companies active in foreign markets, including trade promotion, export credit and development aid agencies (Revised Recommendation, Paragraph I);

- b) provide support for private sector initiatives such as seminars, conferences and technical assistance targeted at the business sector on foreign bribery issues, and, in cooperation with business and other relevant organisations, assist companies in engaging in preventive efforts (Revised Recommendation, Paragraph I);
- c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I);
- d) require CORFO to adopt anti-bribery policies with regard to export credit operations, and consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (Revised Recommendation, Paragraph I);
- e) consider maintaining and/or formalising the GNECC as an oversight and coordinating body for effective implementation of the foreign bribery offence in Chile, including awareness raising activities for the public and private sector (Revised Recommendation, Paragraph I).

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Chile:

- a) revise the instruction document sent to Ministry of Foreign Affairs (MFA) staff regarding foreign bribery to better reflect the nature of the foreign bribery offence and applicable reporting obligations, and issue it to all MFA staff including those at PROCHILE (Revised Recommendation, Paragraph I);
- b) take steps to facilitate the reporting of suspicions of foreign bribery to prosecutors, including by improving the enforcement of the general duty for public officials to report suspicions of crimes directly to law enforcement authorities under art. 175 CPC and art. 55 of Law N° 18,834; and enhance and promote the protection of private and public sector employees who report in good faith suspicions of foreign bribery, in order to encourage them to report such suspicions without fear of retaliation (Revised Recommendation, Paragraph I);
- c) introduce money laundering reporting requirements for appropriate non-financial entities including lawyers, accountants and auditors (Convention, Article 7; Revised Recommendation, Paragraph I);
- d) require auditors to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and take steps to improve the effectiveness of auditors' reporting obligations to competent law enforcement authorities as established in art. 59 of the Company Regulations (RSA) (Revised Recommendation, Paragraph V.B).

Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Chile:

- a) clarify, in an instruction or other appropriate measure, the rules governing the investigation and prosecution of foreign bribery and in particular any possible exceptions to the general rule of mandatory prosecution (Convention, Article 5; Revised Recommendation, Paragraph 1);
- b) align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases and in money laundering investigations by the Financial Intelligence Unit (UAF); and take measures to ensure that financial institutions provide the required financial information promptly in appropriate cases (Convention, Articles 5 and 9(3); Revised Recommendation, Paragraph 1);
- c) take all necessary measures to ensure that Chile will not decline to render mutual legal assistance (MLA) in foreign bribery cases on grounds of bank secrecy; and that MLA can be provided in criminal and non-criminal cases of foreign bribery involving legal persons (Convention Articles 2 and 9);
- d) consider aligning the treatment of the foreign bribery offence with the money laundering offence with regard to the investigative tools made potentially available to prosecutors in appropriate cases (Convention, Article 5; Revised Recommendation, Paragraph 1);
- e) promptly take all necessary action to ensure that territorial jurisdiction extends over all foreign bribery offences committed in whole or in part in Chilean territory; and adopt nationality jurisdiction in foreign bribery cases in order to strengthen enforcement of the offence (Convention, Article 4(1), (2) and (4));
- f) take action to ensure that the overall limitations period for the foreign bribery offence is sufficient to ensure adequate investigation and prosecution, including that the two year period for formalised investigations can be extended as necessary (Convention, Articles 5 and 6; Revised Recommendation, Paragraph 1).

4. With respect to the offence of foreign bribery, the Working Group recommends that Chile:

- a) amend the law to ensure that (i) the foreign bribery offence can apply to bribes composed of non-pecuniary benefits; and (ii) vagueness with regard to the requirement that the advantage supplied by the briber be “undue” is eliminated (Convention, Article 1);
- b) take all necessary measures to ensure that (i) the foreign bribery offence can apply to the giving of a bribe; and (ii) the concept of “public service enterprise” in the definition of “foreign public official” is consistent with the Convention definition of a “public enterprise” (Convention, Article 1).

5. With respect to the liability of legal persons for foreign bribery, the Working Group recommends that Chile amend the law to ensure that all legal persons can be held liable for bribery of foreign public officials in accordance with the Convention (Convention, Article 2).

6. With respect to sanctions for foreign bribery, the Working Group recommends that Chile:

- a) substantially increase the criminal sanctions applicable to foreign bribery in order (i) to provide for effective, proportional and dissuasive sanctions, including in cases where the bribe is solicited by the foreign public official; and (ii) to ensure that effective mutual legal assistance and extradition are not excluded by the level of applicable sanctions in any foreign bribery case (Convention, Article 3(1));

- b) eliminate mandatory reductions of sanctions for foreign bribery (i) in cases of solicitation of the bribe by the foreign public official; and (ii) in cases where the case begins more than half way through the limitation period (Convention, Article 3(1));
- c) in conjunction with the recommended amendment of the law to ensure its application to bribes composed of non-pecuniary benefits, appropriately modify the method of fixing pecuniary sanctions for foreign bribery (Convention, Art. 3);
- d) amend the law to provide that legal persons shall be subject to effective, proportional and dissuasive sanctions for foreign bribery, including fines or monetary sanctions, and confiscation (Convention, Articles 2, 3);
- e) take all necessary measures to ensure that seizure can be initially obtained in appropriate cases without the prior knowledge of the suspect (Convention, Article 3(3));
- f) consider the imposition of additional administrative sanctions upon natural and legal persons subject to criminal sanctions for the bribery of a foreign public official (Convention, Article 3(4)).

7. With respect to related accounting/auditing offences and obligations, the Working Group encourages the Chilean authorities to extend international financial reporting standards (IFRS) to all registered companies in accordance with the intent of the Superintendence of Securities and Insurance (SVS); to consider adopting developing simplified international accounting standards for small and medium sized enterprises; to enforce accounting and auditing offences more effectively in bribery cases; and to continue their efforts to improve audit quality standards, including with regard to certification and independence (Revised Recommendation, Paragraph V).

8. With respect to related tax offences and obligations, the Working Group recommends that Chile implement the decision of the Internal Revenue Service (SII) to strengthen the explicit nature of the prohibition on deducting foreign bribes from taxable revenue in a generally applicable, public and binding circular.

II. Follow-up by the Working Group

9. The Working Group will follow up on the issues below, as practice develops, in order to assess:
- a) the functioning of MLA under the CPC, and in particular with regard to seizure and confiscation and the provision of MLA in cases involving legal persons;
 - b) the coverage of bribery through intermediaries, including unwitting intermediaries;
 - c) whether the prevalence of bribery in the foreign jurisdiction can constitute a defence or mitigating factor;
 - d) the enforcement of the foreign bribery offence under the CPC as it develops;
 - e) the application in practice of the Company Law provisions implementing Article 8 of the Convention.

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<http://www.oecd.org/dataoecd/38/10/39540391.pdf>

Report on progress since October 2007:
<http://oecd.org/dataoecd/8/12/44130051.pdf>

Czech Republic (October 2006)

Based on its findings on the implementation of the Convention and the Revised Recommendation by the Czech Republic, the Working Group (1) makes the following recommendations to the Czech Republic and (2) will follow up certain issues as cases emerge.

I. Recommendations

Recommendations Concerning Prevention, Detection and Awareness of Foreign Bribery

1. Concerning the general awareness of the Convention and foreign bribery, the Working Group recommends that the Czech Republic:

- a) Increase the profile of foreign bribery in its anti-corruption activities;
- b) Engage NGOs, business organisations and enterprises in these activities; and
- c) Ensure that Czech individuals and companies which operate internationally are more aware of foreign bribery and of their exposure to solicitations of bribery by foreign public officials (Revised Recommendation I)

2. Concerning reporting of foreign bribery cases, the Working Group recommends that the Czech Republic consider adopting additional measures to strengthen protection for whistleblowers in order to encourage employees to report suspected cases of foreign bribery without fear of retaliation (Revised Recommendation I).

3. Concerning prevention and detection through export credits, the Working Group recommends that the Czech Export Bank be more proactive in raising awareness of foreign bribery among its staff, clients and potential clients (Revised Recommendation I).

4. Concerning prevention and detection through official development assistance (ODA), the Working Group recommends that the Czech Republic undertake additional activities to raise awareness of foreign bribery among:

- a) Companies and NGOs that are involved in projects funded by ODA; and
- b) Public officials who are involved in administering ODA, including those outside the Ministry of Foreign Affairs (Revised Recommendation I).

5. Concerning the prevention and detection of foreign bribery through taxation, the Working Group recommends that the Czech Republic:

- a) Make more efforts to raise awareness of foreign bribery and the non-deductibility of bribes among tax examiners, tax professionals and the private sector;

- b) Provide training to tax examiners on the detection of bribe payments disguised as legitimate allowable expenses; and
 - c) Disseminate OECD Bribery Awareness Handbook for Tax Examiners in Czech to all tax examiners. The Working Group also encourages the Czech Republic to amend its legislation and remove the restriction against Czech tax officials on reporting foreign bribery detected during tax audits to law enforcement (Revised Recommendations I and IV).
6. Concerning prevention and detection through accounting and auditing in the private sector, the Working Group recommends that the Czech Republic:
- a) Work proactively with the accounting and auditing professions to raise awareness of foreign bribery and encourage these professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation I);
 - b) Consider requiring external auditors to report indications of a possible illegal act of bribery to competent authorities (Revised Recommendation V.B.iv); and
 - c) Clarify the procedure for auditors to provide information to law enforcement authorities upon demand, and raise the awareness of the procedure among auditors (Revised Recommendation I).
7. Concerning prevention and detection through auditing of the public sector, the Working Group recommends that the Supreme Audit Office raise the awareness of foreign bribery among its staff and train its staff on how to detect foreign bribery (Revised Recommendation I).
8. Concerning prevention and detection through anti-money laundering measures, the Working Group recommends that the Czech Republic:
- a) Improve the feedback to entities that are required to report suspicious transactions;⁵
 - b) Provide better guidance to these entities, for instance, by providing up-to-date typologies on money laundering where the predicate offence is bribery; and
 - c) Maintain statistics on suspicious transaction reports that result in or support bribery investigations and prosecutions (Revised Recommendation I).

Investigation, Prosecution and Sanctioning of Foreign Bribery and Related Offences

9. Concerning the investigation of foreign bribery, the Working Group recommends that the Czech Republic:
- a) Continue to train police officers and recruits on foreign bribery, including the practical aspects of such investigations;
 - b) Clarify the rules for dividing competence between the ÚOKFK and the ÚONVDK in foreign bribery cases, particularly those that also involve money laundering or tax offences; and
 - c) Improve the co-ordination among tax, money laundering and corruption investigators in foreign bribery cases (Revised Recommendation I).

⁵ The Working Group notes that this is a general issue for many Parties.

10. Concerning the prosecution of foreign bribery cases, the Working Group recommends that:
 - a) The Judicial Academy organise additional training on foreign bribery for prosecutors and judges, including new recruits (Revised Recommendation I); and
 - b) The Czech Republic maintain statistics on the use of diversion in domestic and foreign bribery cases (Convention Article 3).
11. Concerning extradition and mutual legal assistance, the Working Group recommends that the Czech Republic:
 - a) Issue general instructions to prosecutors which state that the provision of extradition and MLA by the Czech Republic in foreign bribery cases shall not be influenced by factors listed in Article 5 of the Convention, and
 - b) Draw the attention of its courts to the relationship between section 377 of the Criminal Procedure Code and Article 5 of the Convention (Convention Articles 5, 9 and 10).
12. Concerning the offence of foreign bribery, the Working Group recommends that the Czech Republic amend its legislation to exclude the defence of “effective regret” from the offence of foreign bribery (Convention Article 1).
13. Concerning the liability of legal persons for foreign bribery, the Working Group strongly recommends that the Czech Republic establish liability of legal persons for bribery of foreign public officials without delay, and put in place sanctions that are effective, proportionate and dissuasive. They further expect the Czech Republic, within 12 months, to report specifically to the Working Group in writing on the progress of this issue (Convention Articles 2 and 3(2)).
14. Concerning the offence of money laundering, the Working Group recommends that the Czech Republic:
 - a) Consider amending s. 252a of the Criminal Code to expressly cover the laundering of proceeds of foreign bribery where the bribery occurs outside the Czech Republic; and
 - b) Take appropriate measures to enforce the money laundering offence more effectively in connection with bribery cases (Convention Article 7).
15. Concerning the offence of false accounting, the Working Group recommends that the Czech Republic:
 - a) Take appropriate measures to enforce accounting offences in the Act on Accounting more effectively in connection with bribery cases; and
 - b) Ensure that the criminal and administrative penalties for false accounting are effective, proportionate and dissuasive in practice (Convention Article 8).
16. Concerning sanctions for foreign bribery, the Working Group recommends that the Czech Republic:
 - a) Raise awareness among prosecutors of the importance of forfeiture and confiscation, and encourage prosecutors to seek these sanctions in corruption cases whenever possible; and

- b) Ensure that the provisions concerning administrative sanctions are applied when appropriate (Convention Article 3).

17. Concerning statistics, the Working Group recommends that the Czech Republic maintain, to the extent possible, more detailed statistics on the sanctions imposed in domestic and foreign bribery, money laundering and false accounting cases (Convention Articles 3, 7 and 8(2)).

II. Follow-up by the Working Group

18. The Working Group will follow up the issues below as cases develop in the Czech Republic:

- a) The use of diversion in domestic and foreign bribery cases (Convention Article 3);
- b) Whether the prosecution of foreign bribery cases, and the provision of extradition and MLA in such cases are influenced by factors such as national economic interest, the potential effect on relations with another State and the identity of the person involved (Convention Articles 5, 9 and 10);
- c) Whether the Czech Criminal Code covers all acts in relation to the performance of an official's duties, including any use of the public official's position, whether or not within the official's authorised competence (Convention Article 1);
- d) The provision of MLA to other Parties to the Convention in non-criminal proceedings against legal persons (Convention Article 9);
- e) Whether the money laundering offence covers the laundering of proceeds of foreign bribery where the bribery occurs outside the Czech Republic (Convention Article 7); and
- f) The sanctions imposed for foreign bribery, money laundering and false accounting, particularly confiscation and forfeiture (Convention Articles 3, 7 and 8(2)).

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Report on progress since October 2006:

<http://oecd.org/dataoecd/32/33/42229103.pdf>

Denmark (June 2006)

Based on its findings on Denmark's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to Denmark and (2) will follow up certain issues as cases emerge.

I. Recommendations

Recommendations Concerning Prevention, Detection and Awareness of Foreign Bribery

1. Concerning raising awareness of the Convention, the Revised Recommendation and the foreign bribery offence, the Working Group recommends that Denmark take measures to further raise the level of awareness of the Convention, the foreign bribery offence, and the risk that Danish companies engage in bribery abroad (i) among officials in government agencies that could play a role in preventing, detecting and reporting; (ii) among judges and new recruits; (iii) among SMEs and large enterprises doing business abroad, notably by providing guidance and support to the development and adoption of compliance programs; (iv) among accountants and auditors having in mind their reporting obligations; and (v) among business and law school students [1997 Revised Recommendation, Sections I and V.C.i) and following].

2. Concerning the prevention and detection of foreign bribery through taxation, the Working Group recommends that Denmark provide enhanced guidance and training to tax officials on the detection of bribe payments disguised as legitimate allowable expenses, and maintain detailed statistical information on tax offences and reporting by tax officials to law enforcement agencies [1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials; 1997 Revised Recommendation, Sections I, II.ii) and IV].

3. Concerning detection and reporting of foreign bribery cases, the Working Group recommends that Denmark:

- a) adopt measures for ensuring stronger whistleblower protection in the private sector in order to encourage private sector employees to report suspected cases of foreign bribery without fear of retaliation [1997 Revised Recommendation, Sections I and V.C.iv)];
- b) take steps to ensure an effective system for reporting, as appropriate, to the Danish and local law enforcement authorities suspicions of bribery of foreign public officials detected in the context of the administration of development funds and export credit guarantees [1997 Revised Recommendation, Sections I, II.v) and VI];
- c) issue clear guidelines for relevant public servants on how to handle suspicions of foreign bribery offences that they may come across in the course of their duties; this should include providing guidance to diplomatic and trade promotion personnel on the steps that should be taken – including encouraging reporting the matter as appropriate to the Danish and local law enforcement authorities – when there are credible allegations that a Danish company or individual has bribed or taken steps to bribe a foreign public official [1997 Revised Recommendation, Section I].

4. Concerning detection and reporting of foreign bribery through accounting and auditing, the Working Group recommends that Denmark provide clearer guidance to auditors with regard to the scope of their legal obligation to report suspicions of foreign bribery. This should include guidance on how the rules as provided by the Danish standards on auditing relate to the provisions under the ASARPA with regard to the reporting obligations of auditors [1997 Revised Recommendation, Sections V.B.iii) and iv)].

Recommendations Pertaining to Investigation of Foreign Bribery

5. Concerning investigation of foreign bribery, the Working Group recommends that Denmark:
- a) make special investigative means, such as interception of communications, video surveillance and undercover operations, available in foreign bribery investigations where appropriate [Convention, Article 5 ; 1997 Revised Recommendation, Section I];
 - b) ensure that the Danish National Police College provides intensified training of police officers and prosecutors on investigating foreign bribery, including on the practical aspects of bribery investigations [Convention, Article 5 ; 1997 Revised Recommendation, Section I].

Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery and Related Offences

6. Concerning the offence of foreign bribery, the Working Group recommends that Denmark:
- a) clarify that all instances of small facilitation payments given to induce a foreign public official to act in breach of his/her duties in the context of an international business transaction are illegal pursuant to the Danish Criminal Code [Convention, Article 1 ; 1997 Revised Recommendation, Section I];
 - b) within the rules governing its relationship with Greenland and the Faroe Islands, (i) extend the OECD Convention to Greenland at the earliest possible date; and (ii) assist the authorities of the Faroe Islands in adopting the necessary legislation in order to extend ratification of the OECD Convention to the islands at the earliest possible date [Convention, Article 1 ; 1997 Revised Recommendation, Section I];
 - c) ensure that the application of the DPP Guidelines on the liability of legal persons is in no way an impediment to using the full scope of the jurisdictional rules as provided by the Danish Criminal Code [Convention, Article 2 ; 1997 Revised Recommendation, Section I].
7. Concerning sanctions, the Working Group recommends that Denmark:
- a) increase the level of the penalty of imprisonment against natural persons for foreign bribery as provided by Section 122 of the Danish Criminal Code, and ensure that they are effective, proportionate and dissuasive [Convention, Articles 3 ; 1997 Revised Recommendation, Section I];
 - b) seriously consider to further increase the sanctions for accounting offences as provided by Sections 296 and 302 of the Danish Criminal Code. It also recommends that Denmark compile relevant statistics on the application of sanctions for accounting offences in view of the follow-up to the Phase 2 evaluation [Convention, Article 8 ; 1997 Revised Recommendation, Sections I and V].

II. Follow-up by the Working Group

8. The Working Group will follow up the issues below as cases and practice develop in Denmark:
- a) the number, sources and subsequent processing of allegations of violations of the laws against foreign bribery and related offences that are reported to the law enforcement authorities [Convention, Article 5 ; 1997 Revised Recommendation, Sections I and V.B.iii) and iv)];
 - b) information on the application of the offence of bribery of foreign public officials, and the level of criminal and administrative sanctions for foreign bribery [Convention, Articles 1, 2 and 3 ; 1997 Revised Recommendation, Sections I, II.v), and VI];
 - c) the effectiveness of the provisions on confiscation in foreign bribery cases [Convention, Articles 3 ; 1997 Revised Recommendation, Sections I];
 - d) the protection of public sector employees collaborating with the law enforcement agencies, notably employees who report in good faith suspected cases of foreign bribery [1997 Revised Recommendation, Section I];
 - e) the application of the criminal liability of legal persons for the bribery of foreign public officials, including: (i) whether in practice legal or procedural obstacles are encountered in proceeding against the legal person where the natural person who bribes a foreign public official has not been or cannot be proceeded against, (ii) the application of the rules for establishing Danish jurisdiction over foreign bribery offences committed by legal persons [Convention, Article 2; 1997 Revised Recommendation, Section I];
 - f) the application of the 2006 Act on Measures to Prevent Money Laundering and Terrorist Financing, including with respect to the application of sanctions for failure to report; and the development of specific standards by the Danish authorities (in the form of typologies, guidelines and training material) for suspicious transaction reporting [Convention, Article 7 ; 1997 Revised Recommendation, Section I].

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<http://www.oecd.org/dataoecd/14/21/36994434.pdf>

Report on progress since June 2006

<http://www.oecd.org/dataoecd/4/56/41073747.pdf>

Estonia (June 2008)

Based on its findings regarding Estonia's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to Estonia under Part I; and (2) will follow up the issues in Part II when there is sufficient practice.

I. Recommendations

Recommendations for Preventing and Detecting Bribery of Foreign Public Officials

1. Regarding awareness-raising in the public sector, the Working Group recommends that Estonia take steps to:
 - a) Raise the level of awareness of the Convention and foreign bribery within overseas diplomatic representations, law enforcement, prosecutor's offices, the judiciary, as well as the Ministries of Justice, Internal Affairs, Finance (including tax officials), and Economic Affairs and Communications, and
 - b) Provide training to personnel in these bodies on relevant issues where appropriate (Revised Recommendation I).
2. Regarding measures in the private sector, the Working Group recommends that Estonia:
 - a) Raise awareness of the Convention and foreign bribery among the public generally, as well as specifically within the business sector, and the accounting and auditing professions (Revised Recommendation I).
 - b) Take steps to assist the business community to prevent and detect foreign bribery, including by developing tools to that end (Revised Recommendation I).
3. Regarding whistleblower protection, the Working Group recommends that Estonia strengthen measures for protecting whistleblowers, in order to encourage public and private sector employees to report acts of foreign bribery without fear of reprisals or dismissal (Revised Recommendation I).
4. Regarding the reporting of foreign bribery, the Working Group recommends that Estonia:
 - a) Ensure that suspicions of foreign bribery detected by employees of KredEx are reported to law enforcement (Revised Recommendation I).
 - b) Require auditors to report indications of a possible illegal act of bribery to management and corporate monitoring bodies, and consider requiring auditors to report such indications to the competent authorities (Revised Recommendation V.B.iii and iv).
5. Regarding official development assistance (ODA), the Working Group recommends that Estonia:
 - a) Further raise awareness of foreign bribery among staff and project partners involved in ODA, including by providing training (Revised Recommendation I).
 - b) Incorporate an anti-bribery declaration in its standard contract for ODA-funded projects (Revised Recommendation I).

6. Regarding taxation, the Working Group recommends that Estonia make additional efforts to train tax officials on bribery detection and reporting, and to raise their awareness of foreign bribery (Revised Recommendation I).

Recommendations for Effective Investigation and Prosecution of Foreign Bribery and Related Offences

7. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Estonia:

- a) Train new and practising prosecutors, police officers and judges on the offence of foreign bribery and the investigation of legal persons (particularly in bribery cases) (Convention Article 5; Revised Recommendation I).
- b) Take steps to ensure (i) prosecutorial independence in foreign bribery cases, (ii) that terminations of foreign bribery prosecutions under Section 204 of the Criminal Procedure Code are consistent with Article 5 and Commentary 27 of the Convention, and (iii) that plea bargaining and the provision of immunity to co-operating offenders do not impede the effective enforcement of the foreign bribery offence (Convention Article 5).
- c) Amend its legislation to make special investigative techniques available for all cases of foreign bribery where appropriate (Convention, Article 5; Revised Recommendation I).
- d) Transmit as soon as possible information in foreign bribery cases to the competent authorities in foreign states whenever such information could be relevant to an investigation in that state (Convention, Article 9(1); Revised Recommendation VII.i).

8. Regarding the offence of foreign bribery, the Working Group recommends that Estonia:

- a) Amend its Penal Code to define an autonomous foreign bribery offence that fully complies with the requirements of the Convention (Convention, Article 1).
- b) Amend its Penal Code to expressly cover bribery of foreign public officials who perform legislative functions (Convention, Article 1).
- c) Ensure that it covers all acts in relation to the performance of an official's duties, including any use of the public official's position, whether or not within the official's authorised competence (Convention, Article 1).

9. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Estonia:

- a) Amend its Penal Code to broaden the criteria for the liability of legal persons in order to make prosecution of legal persons that commit foreign bribery more likely and more effective (Convention, Articles 2 and 3(2)).
- b) Establish nationality jurisdiction to prosecute legal persons for foreign bribery (Convention, Articles 2, 3(2) and 4(2)).

10. Regarding the limitation period for prosecuting foreign bribery, the Working Group recommends that Estonia consider whether the limitation period allows adequate time for the investigation and

prosecution of this offence, especially in light of the fact that the making of an MLA request does not interrupt or suspend the limitation period (Convention, Article 6).

11. Regarding money laundering, the Working Group recommends that Estonia:

- a) Examine why it has a low number of convictions for money laundering; and
- b) Clarify whether its money laundering offence covers the laundering of a bribe, and whether the predicate offence for money laundering must be a crime at the place where it occurred (Convention, Article 7).

12. Regarding false accounting, the Working Group recommends that Estonia (a) amend the Penal Code to ensure that the false accounting offences cover all of the activities described in Article 8(1) of the Convention, and (b) take steps to ensure that sanctions for false accounting are effective, proportionate and dissuasive (Convention, Article 8).

13. Regarding sanctions for foreign bribery, the Working Group recommends that Estonia:

- a) Take steps to ensure that sanctions for arranging a bribe and arranging a gratuity are effective, proportionate and dissuasive (Convention, Article 3).
- b) Establish formal, written policies for denying ODA contracts and export credit support to legal and natural persons who have been convicted of foreign bribery (Convention, Article 3(4); Revised Recommendation VI).

14. Regarding statistics, the Working Group recommends that Estonia:

- a) Maintain more consistent statistics on investigations, prosecutions, convictions and sanctions involving the money laundering offence, including the identification of predicate offences for money laundering (Convention, Articles 7 and 8).
- b) Maintain statistics on the sanctions (including confiscation) imposed against natural and legal persons for false accounting, money laundering, domestic bribery, and foreign bribery (Convention, Article 3).

II. Follow-up by the Working Group

15. The Working Group will follow up the issues below as practice develops:

- a) Termination of proceedings under Section 202 of the Criminal Procedure Code, plea bargaining, and granting immunity to co-operating offenders (Convention, Article 5).
- b) Prosecutorial independence in foreign bribery cases (Convention, Article 5).
- c) Whether Estonia considers the factors listed in Article 5 and Commentary 27 of the Convention when denying extradition or MLA (Convention, Article 5).
- d) Impact of cross-references between the foreign bribery offence and other Estonian statutes on the enforcement and visibility of the offence (Convention, Article 1; Revised Recommendation I).

- e) Dual criminality requirement on nationality jurisdiction to prosecute natural persons for foreign bribery, and the absence of nationality jurisdiction to prosecute legal persons for foreign bribery (Convention, Article 4(2)).
- f) Limitation period for investigating and prosecuting foreign bribery (Convention, Article 6).
- g) The number of convictions for money laundering (Convention, Article 7).
- h) Whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred (Convention, Article 7).
- i) Sanctions against natural and legal persons for foreign bribery (Convention Article 3).

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<http://www.oecd.org/dataoecd/60/57/40953976.pdf>

Report on progress since June 2008

<http://oecd.org/dataoecd/13/57/46155745.pdf>

Finland (May 2002)

A high level of transparency and accessibility are well-entrenched characteristics of the Finnish government. This was particularly evident during the consultations with the private sector and civil society, which praised the Finnish government for its openness and custom of consulting with them about legislative and policy initiatives.

Pursuant to the Finnish Constitution, the legality of the civil service and the actions of civil servants are monitored by two independent bodies: the Office of the Parliamentary Ombudsman and the Office of the Chancellor of Justice. These bodies have the authority to receive complaints from anyone, regardless of nationality and regardless of the country where the complaint originates, concerning the conduct of all the various Finnish government officials involved in the implementation of the Convention in practice (e.g. police investigations, the handling of requests for mutual legal assistance and extradition).

For two years in a row (2000 and 2001), TI has rated the level of perceived corruption in Finland's public service as the lowest out of approximately 90 countries studied. The Working Group recognises the commendable record of the Finnish government in this regard.

During the on-site visit, it was evident that up to now the Finnish government has based its policy on implementing the Convention and Revised Recommendation on the low level of corruption in the Finnish government. However, more attention should be given to the opportunities of and pressures on Finnish companies and foreign companies located in Finland to bribe in order to compete in sensitive national markets.

In conclusion, based on the findings of the Working Group with respect to Finland's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Finland. In addition, the Working Group recommends that certain issues (para. 9.) be revisited following the development of litigation of the foreign bribery offences.

I. Recommendations

Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

1. The Working Group recommends that Finland:
 - a) Undertake effective public awareness activities for the purpose of educating and advising the public and private sectors about the Convention and consider involving interested business associations and other non-governmental bodies in the delivery of these initiatives. (Revised Recommendation, Article I)
 - b) Clarify internally the responsibilities of state authorities for the implementation of the Convention. (Convention, Article 5)
2. With respect to the reporting of suspected bribery to the appropriate authorities, the Working Group recommends that Finland:

- a) Establish clear guidelines to the effect that tax inspectors are obligated to report cases of suspected foreign bribery and tax fraud to the investigative authorities. [Revised Recommendation, Articles II (ii) and IV]
- b) Evaluate whether an obligation that persons responsible for keeping accounts report suspected bribery transactions would improve the prevention and detection of foreign bribery cases. (Revised Recommendation, Article V)
- c) Require auditors to report indications of a possible foreign bribery offence to management and, where appropriate, corporate monitoring bodies, and consider requiring that such body in turn has a duty to report suspicions of bribery to the investigative authorities. [Revised Recommendation, Article V B, (iii) and (iv)]
- d) Ensure that in practice the absence of an express obligation in the law requiring that money exchange bureaux report suspicious transactions to the Money Laundering Clearing House (MLCH) does not decrease the effective implementation of money laundering legislation, and undertake a consistent and effective approach to monitoring the compliance of real estate agencies with their reporting obligations to the MLCH. (Convention, Article 7)

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Accounting and Money Laundering Offences

- 3. The Working Group recommends that Finland:
 - a) Consider providing guidance to law enforcement agencies and prosecutors clarifying the application of the relevant Penal Code provisions to legal persons in respect of prosecutorial discretion, the statute of limitations and coverage of the law regarding state-owned/controlled companies. (Convention, Articles 2, 5 and 6)
 - b) Provide statistical information to the Working Group about the application of sanctions under the legislation implementing the Convention (i.e., the foreign bribery, accounting, and money laundering offences) to evaluate whether penalties are proportionate, dissuasive and effective in practice. (Convention, Article 3.1; Phase 1 Evaluation, section 4).
 - c) Inform accounting professionals of the practical consequences of the recent Supreme Court decision in which it was decided that anyone who exercises actual authority in respect of bookkeeping could be prosecuted for an accounting offence, to clarify responsibility and raise public awareness in this regard. (Convention, Article 8.2)

II. Follow-up by the Working Group based on the Development of Litigation

- 4. The Working Group will follow up the issues below as litigation of the foreign bribery offences develops:
 - a) Decisions of relevant authorities, including the courts, in regard to the differentiation between aggravated and non-aggravated bribery. (Convention, Article 1.1)
 - b) Decisions of relevant authorities, including the courts, with regard to cases involving bribes to foreign public officials through intermediaries. (Convention, Article 1.1)
 - c) The application of the foreign bribery offence to determine whether it is necessary to prove that, pursuant to the laws of the foreign public official's country, the foreign public official

- had the exact powers to provide the act or omission that the briber intended to obtain. (Convention, Article 1.1; Commentary 3)
- d) The application of sanctions under the legislation implementing the Convention (i.e. the foreign bribery, money laundering and accounting offences) and in the framework of this assessment the Working Group will also:
- (i) review the application of confiscation due to the absence of the authority of the court to order monetary sanctions of a comparable effect and the seemingly low sanctions that have been applied to domestic bribery offences. (Convention, Article 3.3; Phase 1 Evaluation, section 2)
 - (ii) assess the impact of the Criminal Code provisions on the lapsing of sanctions (in respect of fines, confiscation and imprisonment) (Convention, Article 3.1)
- e) The consequences in practice of the non-applicability of the accounting offences to legal persons to determine whether Finland is able to effectively address accounting offences connected with the concealment of foreign bribery. (Convention, Article 8.2; Commentary 29; Phase 1 Evaluation, section 5).

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France (January 2004)

In conclusion, based on the findings of the Working Group with respect to France's implementation of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to France. In addition, the Working Group recommends that certain issues be revisited as the case-law continues to develop.

I. Recommendations

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

1. With respect to awareness raising efforts to promote the implementation of the Act of 30 June 2000 amending the Criminal Code and the Code of Criminal Procedure with regard to the fight against corruption, the Working Group recommends that France:

- a) Continue and strengthen its efforts vis-à-vis enterprises, including small and medium-sized enterprises that do business internationally, and encourage companies to develop and adopt internal control mechanisms, including putting in place ethics committees and warning systems for employees, as well as codes of conduct specifically addressing the issue of transnational bribery. [Revised Recommendation, Articles I and V.C.i)]

2. Regarding detection, the Working Group recommends that France:

- a) Issue regular reminders, via inter-ministerial circulars or any other official channel, to all public officials, and particularly those working for agencies invested with supervisory powers, of their obligation to advise the Public Prosecutor promptly of any violation of the Act of 30 June 2000, pursuant to Article 40 subsection 2 of the Code of Criminal Procedure, and that they be reminded, in this regard, of the disciplinary sanctions applicable in the event of non-compliance with this obligation, having regard in particular to the broad discretion that is granted to them in this area. [Revised Recommendation, Article I]
- b) Issue regular reminders to diplomatic missions of specific instructions concerning measures to be taken when there are presumptions that a French enterprise or individual has bribed or attempted to bribe a foreign public official, including reminders of their obligation to advise promptly the Public Prosecutor. [Revised Recommendation, Article I]
- c) Establish procedures to be followed by employees of the Coface and the Agence Française de Développement for reporting credible evidence of the bribery of a foreign public official to the Public Prosecutor's office and encourage these agencies to set up policies to evaluate the eligibility of enterprises that have been found guilty in the past of acts of foreign bribery for financial assistance provided by these agencies. [Revised Recommendation, Article I]
- d) Consider introducing stronger protective measures for employees who report suspicious facts that may indicate bribery in order to encourage them to report such facts without fear of retaliation in the form of dismissal. [Convention, Article 5; Revised Recommendation, Article I].

- e) Make use of the new law on financial security to enhance the awareness of auditors and provide them with further training regarding the provisions of the Act of 30 June 2000, in connection with their obligation to report any illicit act to the Public Prosecutor's office, and to subject those who fail to comply with that obligation to more severe disciplinary measures. [Convention, Article 8; Revised Recommendation, Article V]
- f) In order to enhance the overall effectiveness of French provisions to fight corruption, make financial and professional organisations which are subject to the obligation to declare suspicious transactions to TRACFIN (the financial intelligence unit) more aware of the provisions of the Act of 30 June 2000, and ensure that available sanctions are applied effectively to all those organisations and professions that are subject to this obligation. [Revised Recommendation, Article I]

Recommendations for ensuring adequate mechanisms for the effective prosecution of offences of bribery of foreign public officials and related offences

3. The Working Group recommends that France:

- a) Given the current exceptional regime assigning to the Public Prosecutor the sole authority to prosecute cases involving the bribery of foreign public officials of States that are not Members of the European Union, and given the hierarchical structure of the Public Prosecutors' office which is by law subject to the executive, facilitate the prosecution based on complaints lodged by victims in cases involving the bribery of public officials of any foreign State, on the same basis as that provided for bribery of French public officials. [Convention, Article 5; Revised Recommendation, Article VI]
- b) Take the necessary steps to extend to an appropriate period the statute of limitations applicable to the offence of bribery of foreign public officials so as to ensure the effective prosecution of the offence, and to facilitate responses to requests for extradition. [Convention, Article 6]
- c) Ensure that, within the framework of the reorganisation of the judiciary specialized in economic and financial offences, sufficient human and financial resources are allocated to investigations and legal proceedings in cases of bribery of foreign public officials, particularly in respect of the new central anti-bribery brigade, the economic and financial poles and specialised training for magistrates assigned to these poles, as well as the processing of requests for international mutual assistance. [Convention, Article 9; Revised Recommendation Articles I and VII; Annex to the Revised Recommendation, Paragraph 6]
- d) Draw the attention of magistrates to the importance of applying effectively the criminal liability of legal persons in cases where enterprises are prosecuted for the bribery of foreign public officials and encourage them to impose, wherever possible, the penalty of confiscation and, to that end, to take the necessary steps to make them aware of the usefulness of such a penalty to sanction the offence of bribery of foreign public officials. [Convention, Articles 2 and 3]
- e) To compile statistics on the number of proceedings involving acts of transnational bribery that have resulted in prosecution or in the shelving of the proceedings, before or after investigation, in order to facilitate assessment and, where appropriate, encourage changes to the relevant criminal policy. [Revised Recommendation, Article 1].
- f) To carry out the requisite consultations with a view to ensuring that appropriate fiscal provisions, in compliance with Article IV of the revised Recommendation of 1997 on the non-deductibility

of bribes, are enacted as soon as possible in French territories that enjoy an autonomous tax status, taking into account the relative risk factors that are associated with them. [Revised Recommendation, Article IV; Phase 1 Evaluation]

II. Follow-up by the Working Group

4. The Working Group will follow up the issues below, as the case-law and practice continue to develop, in order to evaluate:

- a) The application of sanctions with a view to determining whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, in particular, the practice of the courts with regard to the criminal liability of legal persons for the offence of active bribery of foreign public officials. [Convention, Articles 2 and 3]
- b) Whether the current wording – notions of "without right", "at any time", and foreign public officials, and the case law concept of "corruption pact" – as well as the treatment given to the role played by the intermediary in the transmission of a bribe are sufficiently clear to allow effective prosecution of the offence of bribery of a foreign public official. [Convention, Article 1]
- c) Whether the current basis of personal jurisdiction, which makes prosecution contingent on the prior lodging of a complaint by the victim or the official authorities, is an effective means of combating the bribery of foreign public officials having regard to the type of offence in question and the reluctance that certain foreign authorities may have in reporting on the acts of their own public officials. [Convention, Article 4]
- d) The effectiveness of existing mechanisms at the disposal of the tax administration to identify and reject as deductible expenses bribes paid for export contracts. [Revised Recommendation, Article IV]

5. The Working Group will furthermore follow up on the issue of provision of mutual legal assistance by France, to ensure that it is not influenced, in the context of the fight against bribery of foreign public officials, by economic considerations. [Convention, Article 9; Revised Recommendation, Article VII]

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Germany (June 2003)

The Working Group commends Germany for their efforts and co-operation in providing information throughout the whole examination process, including during the on-site visit. Germany has extensive experience with investigation and prosecution of domestic bribery offences, as well as other economic crimes, which is relevant for investigating and prosecuting foreign bribery cases. The experience in practice with respect to these offences facilitated the Working Group's examination of the application of the Convention and the Revised Recommendation in Germany.

In conclusion, based on the findings of the Working Group with respect to Germany's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Germany. In addition, the Working Group recommends that a number of issues be revisited as case law develops.

I. Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

1. The Working Group recommends that Germany increase its efforts to raise the level of general awareness of the foreign bribery offence and the Convention. With respect to the private sector, the Working Group recommends that Germany encourage the continued development and adoption of adequate corporate compliance programmes including for small and medium sized enterprises doing business internationally [Revised Recommendation, Articles I and V.C(i)].
2. With respect to the police and the prosecutorial authorities, the Working Group recommends that Germany:
 - a) Ensure that the issue of foreign bribery is adequately addressed within training programmes (Revised Recommendation, Article I);
 - b) Evaluate whether sufficient resources are being allocated for the purpose of investigating and prosecuting foreign bribery cases (Commentary, 27; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6).
3. With respect to the tax authorities, the Working Group recommends that Germany undertake to reduce the time-lag with regard to the performance of tax audits of the largest companies (Revised Recommendation, Articles I and IV);
4. The Working Group recommends that Germany continue to keep under review whether the existing mechanisms for the inter-Land communication and co-operation for criminal investigations and prosecutions are effective, including the sharing of experience in prosecuting foreign bribery cases (Revised Recommendation, Article I).
5. With respect to the reporting of suspected bribery or money laundering to the appropriate authorities, the Working Group recommends that Germany:

- a) Consider clarifying the obligation to report suspicious transactions for auditors and tax consultants, for example, by issuing guidelines (Revised Recommendation, Article I);
- b) Consider the establishment of mechanisms such as an Ombudsman, anti-corruption unit or hotline in order to facilitate reporting of suspicion of bribery by members of public administration (Revised Recommendation, Article I).

II. Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences

6. The Working Group recommends that Germany compile at the federal level for future assessment information on investigations of the foreign bribery offence for both natural and legal persons, and sanctions of the foreign bribery offence for both natural and legal persons (Convention, Article 3; Phase 1 Evaluation, section 2);

7. The Working Group recommends that Germany take measures to ensure the effectiveness of the liability of legal persons which could include providing guidelines on the use of prosecutorial discretion, and further increasing the maximum levels of monetary sanctions (Convention, Articles 2 and 3; Phase 1 Evaluation, section 2).

8. The Working Group recommends that, as concerns the prosecution of natural persons, Germany consider issuing guidelines which could help provide a uniform application of sections 153a and 153c of the Code of Criminal Procedure, as well as a uniform exercise of discretion between domestic and foreign bribery cases (Convention, Article 5; Commentary, 27; Phase 1 Evaluation, section 3).

III. Follow-up by the Working Group

9. The Working Group will follow up the issues below:

- a) The effectiveness of the reporting of the suspected bribery transactions by the tax authorities in practice (Revised Recommendation, Article I);
- b) The effectiveness of the operation of the new financial intelligence unit within the BKA under the new Money Laundering Act in practice (Revised Recommendation, Article I);
- c) The application of sanctions under the legislation implementing the Convention (i.e. the foreign bribery, money laundering and accounting offences) [Convention, Articles 3, 7 and 8.2; Revised Recommendation, Article V.A(iii)];
- d) The impact of the exception for the money laundering offence where the predicate offence is bribery of a foreign MP, on the effective detection of foreign bribery in practice (Convention, Article 7; Revised Recommendation, Article I);
- e) The adequacy of the statute of limitations for the foreign bribery offence (Convention, Article 6);
- f) Whether, in practice, the sanctions against legal persons for the foreign bribery offence are effective, proportionate and dissuasive (Convention, Articles 2 and 3; Phase 1 Evaluation, section 2).

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Greece (April 2005)

Based its findings on Greece's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to Greece and (2) will follow up certain issues as cases emerge.

I. Recommendations

Recommendations concerning Detection and Prevention of Foreign Bribery

1. With respect to raising awareness of the Convention, the Revised Recommendation and Law 2656/1998, the Working Group recommends that:

- a) Greece take measures to further raise the level of awareness of the foreign bribery offence among officials in government agencies that could play a role in detecting and reporting it, and undertake effective public awareness activities for the purpose of educating and advising the private sector on the offence (Revised Recommendation I);
- b) Greece further raise awareness of these instruments within the public sector, particularly in the Ministries of Finance and Economy, Justice, and the Interior, Public Administration and Decentralisation, the Hellenic Capital Markets Commission, the Export Credit Insurance Organisation, Hellenic Aid and among tax officials (Revised Recommendation I);
- c) Greece work proactively with the accounting, auditing and legal professions to establish training and awareness-raising activities about the foreign bribery offence in order to maximise the opportunities for prevention and deterrence within the business community (Revised Recommendation I);
- d) the Export Credit Insurance Organisation, Hellenic Aid and the Hellenic Capital Markets Commission make greater efforts to promote these instruments and the consequences of engaging in bribery to their clients and prospective clients (Revised Recommendation I);
- e) Greece issue guidance to foreign representations and embassy personnel concerning the steps that should be taken where non-frivolous allegations arise that a Greek company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Greece (Revised Recommendation I).

2. With respect to measures to disallow the tax deductibility of bribe payments to foreign public officials, the Working Group recommends that Greece consider introducing an express denial of deductibility in order to strengthen the mechanisms available for detecting and deterring the offence (Revised Recommendations IV).

3. With respect to prevention and detection of foreign bribery through accounting and auditing, the Working Group recommends that Greece devise guidelines on reporting foreign bribery and false accounting for accountants and auditors, and require external auditors to report indications of bribery to corporate monitoring bodies (such as the Hellenic Capital Markets Commission) as appropriate (Revised

Recommendations V.B.iii and V.B.iv).

4. Concerning other measures to prevent and detect foreign bribery, the Working Group recommends that Greece undertake initiatives to (i) remind employees of their legal obligation to report crimes, and (ii) consider introducing specific measures to further protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retribution (Convention, Article 5; Revised Recommendation I).

Recommendations Pertaining Investigation of Foreign Bribery

5. With respect to investigation of foreign bribery, the Working Group recommends that Greece:
- a) establish procedures for co-ordination, sharing information and resolving conflicts of competence between the Internal Affairs Division of the Hellenic Police and the Special Investigations Service, and consider assigning the competence for investigating domestic and foreign bribery to a single law enforcement agency, and provide further training on the practical aspects of foreign bribery investigations to members of the relevant law enforcement agencies (Revised Recommendation I);
 - b) ensure that the National School of Judicature continue its training programmes on foreign bribery for prosecutors and judges, including new recruits (Revised Recommendation I).

Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery

6. With respect to the prosecution of foreign bribery, the Working Group recommends that Greece:
- a) eliminate the requirement of a complaint from the government of the country in which the crime was committed before asserting nationality jurisdiction to prosecute foreign bribery (Convention Article 4(2));
 - b) amend its legislation to exclude the application of Article 30(2) of the Code of Penal Procedure (which exempts “political offences” and “offences through which the international relations of the state may be disturbed” from prosecution) from foreign bribery cases (Convention Article 5 and Commentary 27);
 - c) ensure delays in proceedings do not result in the expiry of limitation periods in foreign bribery cases (Convention Article 6);
 - d) ensure that liability of legal persons for foreign bribery is effective, particularly regarding (i) the threshold for imposing liability, and (ii) the categories of persons whose acts may trigger the liability of a legal person (Convention Article 2).
7. With respect to sanctions for foreign bribery, the Working Group recommends that Greece ensure that the amount of an administrative fine against a legal person does not depend solely on the value of a contract obtained by the briber (Convention Article 3(2)).

II. Follow-up by the Working Group

8. The Working Group will follow up the issues below as cases and practice develop in Greece:
- a) whether Law 2656/1998 covers the following situations (i) bribery of a foreign public official who uses his/her position in excess of his/her powers, and (ii) a briber who is the

- best-qualified bidder (Convention Article 1);
- b) the application of the defence of “effective regret” in Article 236 of the Penal Code in foreign bribery cases (Convention Article 1);
 - c) whether the effective seat theory provides a sufficiently broad jurisdictional base for imposing liability against legal persons for foreign bribery (Convention Articles 2 and 4);
 - d) effectiveness of the system of concurrent proceedings against the principal offender and a legal person in Greece, and whether in practice proceedings against legal persons will be taken independently of proceedings against a principal offender, including whether conviction of the principal is a prerequisite (Convention Article 2);
 - e) sanctions imposed against natural persons (including confiscation) for foreign bribery based on statistics provided by Greece (Convention Article 3);
 - f) whether sanctions imposed against legal persons for foreign bribery are effective, proportionate and dissuasive, in view of Article 5 of Law 2656/1998 which imposes an administrative fine of up to three times the value of the benefit (Convention 3(2)).

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Hungary (May 2005)

Based on its findings regarding Hungary's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the following recommendations to Hungary under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

Part I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Hungary:

- a) take further action to raise the level of awareness of the foreign bribery offence and the need for its enforcement among those agencies that work with Hungarian companies active in foreign markets, including trade promotion agencies and officials [Revised Recommendation, Paragraph I];
- b) ensure that, in light of the transfer of anti-corruption responsibilities from the Prime Minister's Office Secretariat Responsible for Public Assets to the Ministry of Justice in December 2004, the Ministry of Justice has appropriate resources to carry out its new role. [Revised Recommendation, Paragraph I];
- c) put in place practical training for those actively involved in enforcement of the foreign bribery offence, including in particular for the Central Investigation Office of the Public Prosecution Service (CIOPPS) and the Anti-Corruption Unit (ACU) at the National Police Headquarters [Revised Recommendation, Paragraph I];
- d) ensure that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved shall not be taken into account in the investigation or prosecution of foreign bribery cases [Convention, Article 5];
- e) take appropriate action to improve awareness among companies and others of the foreign bribery law and of the intention to enforce it [Revised Recommendation, Paragraph I];
- f) take measures to raise awareness of the foreign bribery offence among the accounting, auditing and legal professions, and to ensure that accounting and auditing issues related to bribery are regularly examined in the context of the mandatory training requirements for auditors. [Revised Recommendation, Paragraph I].

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Hungary:

- a) consider expanding the scope of article 255B CC, which sanctions the failure to report domestic bribery by public officials, to provide sanctions for the non-reporting of foreign bribery offences [Revised Recommendation, Paragraph I];
- b) provide guidance and training to tax officials on the application of the new rules prohibiting tax deductibility, including the detection of bribe payments disguised as legitimate allowable expenses [Revised Recommendation, Paragraph 1];
- c) take appropriate measures to require auditors by law to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and consider requiring auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities [Revised Recommendation, Paragraph V.B];
- d) consider introducing stronger measures to protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retaliatory action [Revised Recommendation, Paragraph 1];
- e) take appropriate steps to improve the flow of information and feedback between the relevant actors in the anti-money laundering system [Revised Recommendation, Paragraph 1].

Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Hungary:

- a) clarify the competence of CIOPPS regarding foreign bribery cases, and take effective measures to ensure that CIOPPS promptly receives relevant information concerning such cases, notably by ensuring that the police and prosecutorial authorities are aware that they should refer foreign bribery cases to CIOPPS [Convention, Article 5; Revised Recommendation, Paragraph 1];
- b) ensure that the necessary resources are made available, in particular at CIOPPS, for the effective investigation and prosecution of the foreign bribery offence, and consider enabling the same prosecutor to follow a case throughout the entire investigation and prosecution, including at the trial stage [Convention, Article 5; Revised Recommendation, Paragraph 1];
- c) consider taking appropriate measures to make MLA available to all Parties to the Convention in cases involving administrative or civil proceedings against legal persons for foreign bribery and ensure that sufficient resources are available to effectively carry out MLA obligations [Convention Article 9(1); Revised Recommendation, Paragraph VII(iii)];
- d) in order to increase transparency, include instructions by senior prosecutors in the case file, and review possibilities for challenging decisions to close investigations, notably through private prosecutions by competitors [Convention, Article 5; Revised Recommendation Paragraph 1];
- e) extend the statute of limitations applicable to the offence under article 258/B(1) CC to an appropriate time so as to ensure the effective prosecution of the offence, in line with the period for the offence under article 258/B(2), and allow for sufficiently long investigation periods [Convention, Article 6; Revised Recommendation Paragraph 1];

- f) consider, within the constitutional principles of the State, measures that may be taken in order to ensure that immunity does not impede effective investigation, prosecution and adjudication in foreign bribery cases [Convention, Article 5; Revised Recommendation Paragraph 1].

4. With respect to the criminal liability of legal persons for foreign bribery, the Working Group recommends that Hungary:

- a) amend the law on the criminal liability of legal persons to eliminate, insofar as they apply to foreign bribery cases, (1) the requirement that a natural person be convicted and punished as a prerequisite to the liability of a legal person; (2) the requirement that the bribe must have aimed at or resulted in the legal entity gaining "*financial*" advantage or profit; and (3) the requirement that the bribe must have aimed at giving or have actually given such an advantage to the specific legal entity subject to prosecution. [Convention, Articles 2 and 3];
- b) consider (1) defining more clearly and more broadly than by the reference to a "*chief executive*" the class of persons whose failure to supervise can trigger the liability of the legal person; and (2) establishing minimum standards with regard to appropriate supervision by such persons in order to avoid liability [Convention, Articles 2 and 3].

5. With respect to related tax and accounting/auditing offences, the Working Group recommends that Hungary:

- a) take appropriate measures to enforce accounting and auditing offences more effectively, particularly in connection with bribery cases [Convention, Article 8];
- b) take all necessary measures to ensure that no conviction for foreign bribery is required to deny the deductibility of the suspected bribe, and review the operation of the time limit for reopening a tax case [Revised Recommendation Paragraph IV].

6. With respect to sanctions, the Working Group recommends that Hungary:

- a) consider introducing additional civil or administrative sanctions for natural persons convicted of foreign bribery, analogous to those applicable to legal persons, and compile relevant statistical information [Convention, Article 3; Revised Recommendation, Paragraph 1];
- b) consider taking measures to improve the effectiveness of sanctions on companies convicted of bribery [Convention Article 3(1), (4)].

Part II. Follow-up by the Working Group

7. The Working Group will follow-up on the issues below, as practice develops, in order to assess:

- a) in light of the recent entry into force of the law on the liability of legal persons, the absence of case law and the inability to review the Explanatory Memorandum concerning the new law, the application and interpretation of the law as it applies to foreign bribery [Convention, Articles 2, 3];
- b) the application of the foreign bribery provisions as case law develops, including with regard to the definition of foreign public official and the question of bribery through intermediaries [Convention, Article 1];

- c) whether the defence of duress is limited to threats of physical or psychological damage [Convention, Article 1];
- d) jurisdiction over cases of bribery of foreign public officials, notably as regards legal persons and offences committed in whole or in part abroad [Convention, Article 4];
- e) actions taken when Hungary refuses to extradite based on the Hungarian nationality of the person whose extradition is requested [Convention, Article 10(3)];
- f) the application of sanctions by the courts and the use of confiscation and confiscation of assets measures in cases of bribery of foreign public officials, to ensure they are effective, proportionate and dissuasive [Convention, Article 3].

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Iceland (March 2003)

In conclusion, based on the findings of the Working Group with respect to Iceland's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Iceland. In addition, the Working Group recommends that a number of issues be revisited as case law develops.

I. Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

1. The Working Group recommends that Iceland develop further efforts to raise the level of general awareness of the offence of bribery in international business transactions as well as enhance mechanisms for the detection of bribery offences (Revised Recommendation, Article I).
2. With respect to the public sector, the Working Group particularly recommends that Iceland:
 - a) enhance awareness and establish appropriate procedural guidelines and training for the detection of foreign bribery within the agencies responsible for detecting and/or investigating the offences usually related to bribery offences. (Revised Recommendation, Articles I and IV);
 - b) clarify and publicise the extent of the obligation of all public officials to report bribery offences of which they become aware, and in particular consider introducing a clearer obligation for all tax officials to inform and co-operate with the law enforcement authorities on any suspicion of bribery; (Revised Recommendation, Article I);
 - c) maintain the efficiency and specialisation of the Unit for investigation and prosecution of serious economic and environmental crimes; (Revised Recommendation, Article I);
3. With respect to the private sector, the Working Group recommends that Iceland:
 - a) co-operate with private sector organisations in order to raise awareness of companies, and in particular encourage and promote internal corporate compliance programmes for exporting companies. In addition, guidance by private sector organisations on how to deal with solicitation of bribes would be useful (Revised Recommendation, Articles I and V.C.i and iv).
4. With respect to accounting and audit profession, the Working Group recommends that Iceland:
 - a) encourage the accounting and auditing profession to organise special training sessions focussed on bribery and related offences, in the framework of their professional education and training system (Revised Recommendation, Article I);
 - b) encourage the adoption of a code of ethics by the auditing profession and reflect further on the rules on the independence of auditors; (Revised Recommendation, Article V.B.ii);
 - c) require auditors to report indications of a possible illegal act of bribery committed by any employee or person acting on behalf of a company to management and, as appropriate, to

corporate monitoring bodies without delay. In addition, the Working Group recommends that Iceland consider requiring auditors to report such indications to the competent authorities; (Revised Recommendation, Article V.B.iii and iv).

II. Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Tax and Money Laundering Offences

5. The Working Group recommends that Iceland consider the following modifications to its legislation by:

- a) aligning the language concerning third party beneficiaries in section 109 GPC concerning bribery of a foreign public official with section 128 GPC concerning passive bribery so that third party beneficiaries are clearly covered; (Convention, Article 1);
- b) reviewing the provisions dealing with bribery and considering appropriate changes in order to ensure complete consistency in the terms used in such provisions (e.g. Section 19c of the GPC and Section 1 of Act 144/1998 concerning the natural person triggering the liability of legal persons; Section 109 of the GPC and Section 52 of Act 75/1981 concerning the nature of the bribe and the definition of public officials); (Convention, Articles 1 and 2; Revised Recommendation, Article IV).

III. Follow-up by the Working Group

6. In light of the small number of cases of domestic bribery and the absence of case law concerning bribery of foreign public officials, it is very difficult to assess how the Icelandic legislation will be applied in practice. The Working Group will therefore revisit the case law regarding bribery in a general way as it develops. (Convention, Articles 1, 3, 5). This concerns in particular:

- a) the elements of the offence explored in Phase 1 that are specific to the offence of corruption and whose interpretation cannot be inferred from the application of other similar offences, as well as the coverage of intermediaries and the interpretation of the term “foreign public official”; (Convention, Article 1 and Commentaries 4 to 10 and 12 to 19)
- b) the criminal liability of legal persons, to ascertain within a reasonable period whether the foreign bribery offence is effectively applied to legal persons; (Convention, Article 2);
- c) the application in practice of the universal jurisdiction and international co-operation obligations under the Convention and the effectiveness of the provisions on confiscation, in particular with respect to the possibilities of confiscation from third parties; (Convention, Articles 3, 4, 9 and 10).
- d) the extent to which Icelandic authorities direct more attention on money laundering linked to forms of criminality other than drug offences, including the bribery of a foreign public official. (Convention, Article 7).

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/12/8/2498248.pdf>

Report on progress since March 2003:

<http://www.oecd.org/dataoecd/43/7/36682053.pdf>

Ireland (March 2007; Phase 2bis: December 2008)

The Working Group appreciates the openness of those Irish Government officials who participated in the Phase 2 examination, as well as their genuine efforts to provide requested information to the examining team within a reasonable period following the on-site visit. However, for the reasons given below, the Working Group concludes that Ireland has not fully met its Phase 2 monitoring obligations, with the result that the Working Group was not able to adequately and fully assess Ireland's implementation of the Convention under the Phase 2 procedures.

The Working Group takes note of the very low level of attendance by Irish officials and representatives of other groups at the on-site visit, which limited the lead examiners in assessing issues. Only the Office of the Director of Corporate Enforcement was represented at a panel concerning awareness-raising, prevention and detection of foreign bribery by the public sector. The absence in particular of one key ministry at this panel signals that Ireland does not appreciate the crucial role that it needs to play in ensuring an adequate level of awareness of the Convention and the relevant legislative framework. Indeed, the Department of Justice, Equality and Law Reform acknowledged that no awareness-raising activities on the Convention have been provided by the Irish authorities either internally or targeted at the private sector. In addition, the private sector was not consulted on the 2001 amendments to the relevant legislative framework. It is therefore not surprising that only one Irish company attended the panel dedicated to the private sector, and that no representatives of the legal profession attended the panel on the perspectives of the private Bar and legal academics.

The low level of participation also limited the lead examiners in assessing the effectiveness of the statutory framework for implementing the Convention as they were not afforded the interactive environment necessary for an effective examination of the implementation of Article 1 of the Convention. The importance of a fully interactive examination of the relevant legislative framework is underscored by its complexity, given that Ireland implemented Article 1 of the Convention through two offences contained in two statutes, one statute which is based on a statutory framework that has been widely criticised as outdated, and given that the two offences contain overlapping and apparently inconsistent elements.

The Working Group is pleased that since the Phase 2 on-site visit Ireland has demonstrated that it intends to give implementation of the Convention higher priority. A large delegation consisting of representatives from all the key ministries and agencies involved in implementing the Convention attended the examination in the Working Group, and was willing to engage in an in-depth discussion on Ireland's implementation of the Convention. However, in the short time-frame available, and given the impossibility of holding separate meetings with all the relevant bodies to elicit different opinions and interpretations as required by the procedures for Phase 2 on-site visits, the Working Group was unable to engage in the discussions which should have taken place at the on-site visit. Ireland also demonstrated renewed commitment through its announcement that preparation of a Prevention of Corruption (Amendment) Bill had been approved by the Government, and that the Government intends to move quickly to introduce it to Parliament.

In view of these circumstances, the Working Group welcomes and accepts an invitation by Ireland to carry out another two to three-day on-site evaluation of Ireland in approximately one year, which the Working Group feels is necessary to achieve two main purposes: (i) to provide the examination team with

the opportunity to convene the panels that were not attended or were inadequately attended and ensure an adequate assessment of the issues that should have been discussed during these panels; and (ii) to make an effective assessment of the implementation of Article 1 of the Convention. Regarding the latter purpose, one year from now the examination team will also be able to assess progress made on reforming the legislative framework for implementing Article 1, due to the soon to be published Prevention of Corruption (Amendment) Bill. In addition, since Ireland recently introduced reforms to improve the process for consulting on statutory instruments, a second on-site visit will enable the team to assess the effect of this new process on implementation of the Convention, in particular whether the private sector is actively engaged.

In addition, based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Ireland, the Working Group (i) makes further recommendations to Ireland under Part 1 and (ii) will follow-up the issues under Part 2 where there has been sufficient practice in Ireland.

I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention related activities to promote the implementation of the Convention and Revised Recommendation, the Working Group recommends that Ireland:

- a) Promptly take all necessary measures, including appropriate training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Irish companies operating abroad, including foreign diplomatic representations, trade promotion and development aid agencies [Revised Recommendation I];
- b) Promptly take all necessary action, in cooperation with business organisations and other civil society stakeholders, to improve awareness of the foreign bribery offence among companies, and in particular small and medium size companies, active in foreign markets, and advise and assist companies with regard to the prevention and reporting of foreign bribery; and consider appointing a specific committee in charge of developing and coordinating such awareness raising programmes [Revised Recommendation I]; and
- c) Work proactively with the accounting and auditing profession to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to include training on foreign bribery in their professional education and training [Revised Recommendation I].

2. With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that Ireland:

- a) Adopt comprehensive measures to protect public and private whistleblowers in order to encourage those employees to report suspected cases of foreign bribery without fear of retaliation [Revised Recommendation I];
- b) Establish procedures to be followed by public sector employees, and in particular employees of the Department of Foreign Affairs, and of trade promotion and development aid agencies, for reporting to law enforcement authorities in Ireland credible information about foreign bribery offences that they may uncover in the course of their work, and encourage and facilitate such reporting [Revised Recommendation I];

- c) Ensure that the necessary human and financial resources are made available (i) to the FIU for adequately dealing with suspicious transactions reports and forwarding them in due time to the investigative authorities; and (ii) to the Irish Financial Regulator and Self-Regulatory Organisations (non-financial sector) for an adequate enforcement of sanctions for non compliance with AML laws and regulations [Revised Recommendation I]; and
- d) Require external auditors to report all suspicions of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, regardless of whether or not the suspected bribery would have a material impact on the financial statements, and of whether the suspected offence falls under the Prevention of Corruption Act 2001 or the Criminal Justice (Theft and Fraud Offences) Act 2001; and consider requiring external auditors, where appropriate, to report such suspicions to the competent law enforcement authorities [Revised Recommendation V.B.].

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

3. With respect to the investigation and prosecution of foreign bribery offences, the Working Group recommends that Ireland ensure the continuation of provision of intensified training to police officers, prosecutors and judges on foreign bribery, including the practical aspects of bribery investigations and the application of foreign bribery offences to legal persons [Revised Recommendation I].

4. Concerning jurisdiction, the Working Group recommends that Ireland promptly establish nationality jurisdiction under the Prevention of Corruption (Amendment) Act 2001 as provided under the Criminal Justice (Theft and Fraud Offences) Act 2001 [Convention, Article 4].

5. With respect to the implementation of Article 1 of the Convention through the offence of bribing an “agent” under the Prevention of Corruption Act 2001 and the offence of bribing an “official” under the Criminal Justice (Theft and Fraud Offences) Act 2001, the Working Group recommends that, in the context of the ongoing preparation of the Prevention of Corruption (Amendment) Bill, Ireland amend the current statutory framework as follows:

- a) Consolidate or harmonise the offence under the Prevention of Corruption Act 2001 with the one under the Criminal Justice (Theft and Fraud) Offences Act 2001, to remove inconsistencies between the two offences which could provide obstacles to the effective implementation of the Convention, including as follows:
 - (i) the terminology used to describe the nature of the advantage prohibited from being offered, promised or given,
 - (ii) by seriously considering amending the Prevention of Corruption Act 2001 to remove any ambiguity concerning whether the prosecution must prove that the foreign public official was an “agent” and whether the agent-principal fiduciary relationship has been violated,
 - (iii) by clarifying the term “corruptly” in the Prevention of Corruption Act 2001, in the absence of clear case law of what the prosecution must prove in this respect,
 - (iv) by ensuring that the Attorney-General’s consent under the 1906 Prevention of Corruption Act is not required; and
- b) Take appropriate steps to ensure that bribery of foreign public officials covers: (i) employees of foreign public enterprises regardless of their legal form, including those under the indirect control

of a foreign government(s), and (ii) agents of international organisations to which Ireland is not a party [Convention, Article 1].

6. With respect to the liability of legal persons for the offences implementing Article 1 of the Convention under the Prevention of Corruption Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001, the Working Group recommends that Ireland undertake a review of the relevant law on the criminal liability of legal persons with a view to codifying and clarifying its scope, and that in addition Ireland do the following:

- a) Expand the scope of liability to cover, in addition to bribery committed personally by a senior person (e.g., directors and high managerial agents), bribery committed by a lower level person with the express or implied permission of a senior person; and
- b) Expressly provide for the liability of unincorporated legal persons [Convention, Article 2].

7. With respect to related tax, accounting and money laundering offences, the Working Group recommends that Ireland:

- a) Amend its tax legislation to clarify that bribes to foreign public officials are not tax-deductible; and expressly communicate to tax examiners the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, through the issuance of guidelines or manuals, and training programmes [Revised Recommendation I and IV];
- b) Ensure that false accounting offences are sanctioned in an effective, proportionate and dissuasive manner [Convention, Article 8];
- c) Amend the double criminality exception for the money laundering offence under section 31(7) of the Criminal Justice Act 1994, in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred [Convention, Article 7]; and
- d) Maintain more detailed statistics on (i) sanctions in money laundering cases, including the size of fines and forfeited/confiscated assets, and whether bribery is the predicate offence; and (ii) on suspicious transaction reports that result in or support bribery investigations, prosecutions and convictions [Convention, Article 7].

8. With respect to sanctions for foreign bribery offences, the Working Group recommends that Ireland:

- a) Ensure that legal persons are subject to effective, proportionate and dissuasive sanctions for foreign bribery [Convention, Articles 2 and 3];
- b) Consider introducing additional civil or administrative sanctions by the courts for natural and legal persons convicted of foreign bribery [Convention, Article 3];
- c) Revisit the policies of agencies such as those responsible for development aid, public procurement, and public-private partnerships, to take due consideration in their contracting decisions of prior convictions for all foreign bribery offences [Convention, Article 3; Revised Recommendation II(vi), and VI (ii) and (iii)]; and

- d) Draw the attention of investigative and prosecutorial authorities to the importance of requesting confiscation as a sanction for foreign bribery [Convention, Article 3].

II. Follow-up by the Working Group

- 9. The Working Group will follow-up on the issues below, as practice develops, in order to assess:
 - a) The effectiveness in practice of territorial jurisdiction under Irish law to enable the effective application of the offence under the Prevention of Corruption (Amendment) Act, 2001 [Convention, Article 4];
 - b) That considerations of national economic interest, the potential effect on relations with another State and the identity of the person involved shall not influence (i) investigation and prosecution of foreign bribery cases; and (ii) decisions regarding mutual legal assistance or extradition [Convention, Articles 5, 9 and 10];
 - c) The level of sanctions, including confiscation, pronounced by the courts in foreign bribery cases to assess whether they are sufficiently effective, proportionate, and dissuasive [Convention, Article 3]; and the sanctions for money laundering imposed in Ireland [Convention, Article 7]; and
 - d) With respect to auditing standards, whether the threshold for external audit requirements is adequate in practice to trigger external audit of all companies with substantial overseas operations [Revised Recommendation V.B.]; and the effectiveness of the new provisions regarding internal company controls in the Companies (Auditing and Accounting) Act 2003, once they have entered into force [Revised Recommendation V.C.].

PHASE 2BIS

Pursuant to the Phase 2 Recommendations of the Working Group, the purpose of the Phase 2bis evaluation of Ireland was to (i) to provide the examination team with the opportunity to convene the panels that were not attended or were inadequately attended at the time of the Phase 2, and ensure an adequate assessment of the issues that should have been discussed during these panels; and (ii) to make an effective assessment of the implementation of Article 1 of the Convention.

Ireland made fully satisfactory efforts in terms of preparation and participation during the Phase 2bis process. The on-site visit on 11-13 June 2008 was attended by a high number of participants, from both the public and the private sector. The Irish authorities provided the examining team with all the necessary information, before, during and following the on-site visit.

Ireland accomplished some progress in strengthening its legal framework for fighting the bribery of foreign public officials, in particular through legislative amendments to be made to the Prevention of Corruption Act 1906 and the Prevention of Corruption (Amendment) Act 2001 through the Prevention of Corruption (Amendment) Bill 2008. While the Working Group welcomes this action, the amendments in the Prevention of Corruption (Amendment) Bill 2008 do not address all the Working Group concerns expressed in the Phase 2 Report and reiterated here. The Working Group is disappointed that Ireland did not seize the opportunity to act upon the Phase 2 recommendations to consolidate and harmonise the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal Justice (Theft and Fraud Offences) Act 2001. The Working Group is concerned that, by failing to address these issues in the 2008 Bill, Ireland may now not have the opportunity to respond to these concerns in the

near future. The legislative framework for fighting foreign bribery in Ireland therefore continues to require further strengthening in order to ensure full compliance with the relevant Phase 2 Recommendations, notably as concerns the foreign bribery offence. The Working Group is encouraged by Ireland's recent declaration that it is disposed to act on some of those recommendations by making changes to the 2008 Bill which would result in greater consistency between the two statutes.

With regard to the liability of legal persons, the Working Group welcomes additional explanations provided by Ireland, but notes that no changes have occurred since Phase 2.

The Irish authorities also initiated significant efforts to raise awareness of the foreign bribery offence among relevant officials in the Irish public sector, as well as within the business community.

Based on the issues of concern identified by the Working Group in the Phase 2 Report on Ireland's application of the Convention and the Revised Recommendation, the Phase 2bis Report and recommendations focus on awareness raising initiatives; detection and reporting; investigation and prosecution of foreign bribery cases; the foreign bribery offence, in particular as affected by the Prevention of Corruption (Amendment) Bill 2008; and the liability of legal persons. In view of this, the Working Group (I) makes the following recommendations to Ireland, and (II) will follow-up certain issues when there has been sufficient practice

I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

10. With regard to prevention, awareness raising and training, the Working Group recommends that Ireland continue its efforts to raise the level of awareness on the foreign bribery offence and on the risks that Irish companies may engage in bribery abroad: (i) within the public administration and amongst those agencies that deal with Irish enterprises operating abroad, including trade promotion agencies and Irish diplomatic missions; and (ii) within the Irish business community, including SMEs, engaging in business abroad [Revised Recommendation I].

11. With regard to the detection and reporting of the foreign bribery offence, the Working Group recommends that Ireland:

- a) Proceed promptly with its intention to put in place procedures for public sector employees, including staff of Irish diplomatic missions, to encourage and facilitate the reporting of suspected foreign bribery that they may uncover in the course of their work; and
- b) As concerns legislation on whistleblower protection, proceed promptly with the enactment of whistleblowing provisions as proposed under the Prevention of Corruption (Amendment) Bill 2008. In this regard, Ireland should pursue its intention to: (i) expand the definition of "appropriate persons" to whom communications can be made; and (ii) allow for the confidentiality of such communications, in order to encourage public and private whistleblowers to report suspected cases of foreign bribery without fear of retaliation [Revised Recommendation I].

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

12. With regard to the foreign bribery offence, the Working Group reiterates its Phase 2 recommendations, and recommends that Ireland consolidate and harmonise, as a matter of priority, the two separate foreign bribery offences in the Prevention of Corruption (Amendment) Act 2001 and the Criminal

Justice (Theft and Fraud Offences) Act 2001 to remove inconsistencies between the two statutes, including [Convention, Article 1]:

- a) By proceeding promptly with the enactment of the Prevention of Corruption (Amendment) Bill 2008, and pursuing its intention to make changes to the Bill in order to: (i) harmonise the terminology used to describe the nature of the advantage prohibited from being offered, promised or given; (ii) harmonise the scope of nationality jurisdiction for the foreign bribery offence in a manner that does not restrict nationality jurisdiction; and (iii) clarify the term “corruptly”, in the absence of clear case law of what the prosecution must prove in this respect;
- b) By amending the Prevention of Corruption Act 2001 to remove reference to the term “agent” in order to avoid any ambiguity concerning whether the prosecution must prove that the foreign public official was an “agent” and whether the agent-principal fiduciary relationship has been violated; and
- c) By taking the first possible opportunity to consolidate the corruption offences into a single piece of legislation.

13. With regard to the liability of legal persons, the Working Group reaffirms its concern and reiterates its recommendations expressed in Phase 2. The Working Group recommends that Ireland [Convention, Articles 2 and 3]:

- a) Adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery; and
- b) Expressly provide for the liability of unincorporated entities.

II. Follow-Up by the Working Group

14. In addition, the Working Group will follow-up, as practice develops:

- a) The application of “reasonable grounds” required to obtain search warrants in the investigation of foreign bribery; and
- b) The application of nationality jurisdiction to the bribery of foreign public officials as provided in the Prevention of Corruption (Amendment) Bill 2008.

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/27/45/38322693.pdf>

Complete Phase 2bis Report available at:

<http://oecd.org/dataoecd/33/6/41869600.pdf>

Report on progress since March 2007 (Phase 2 and Phase 2 bis)

<http://oecd.org/dataoecd/54/0/44856334.pdf>

Israel (December 2009)

Based on its findings regarding Israel's implementation of the Convention and the Revised Recommendation, the Working Group: (1) makes the following recommendations to Israel under Part 1; and (2) will follow up the issues in Part 2 when there is sufficient practice.

I. Recommendations

Recommendations for Preventing and Detecting Bribery of Foreign Public Officials

1. Regarding awareness-raising in the public sector, the Working Group recommends that Israel take steps to continue to raise the level of awareness of the Convention and the foreign bribery offence, including further attention to the detrimental effects of foreign bribery, within the public sector generally as well as specifically within the Ministry of Foreign Affairs Center for International Cooperation (MASHAV) and the Defense Export Controls Directorate of the Ministry of Defense (Revised Recommendation I).
2. Regarding measures in the private sector, the Working Group recommends that Israel:
 - (a) Continue to raise the level of awareness of the Convention and the foreign bribery offence, including further attention to the detrimental effects of foreign bribery and the extraterritorial effect of the offence, amongst the public generally as well as specifically within the business sector and defence industry, including through the engagement of businesses operating abroad by Israeli overseas diplomatic representatives (Revised Recommendation I).
 - (b) Consider making key resources on the Convention and the foreign bribery offence available in Arabic, English and Russian (Revised Recommendation I).
3. Regarding whistleblower protection, the Working Group recommends that Israel:
 - (a) Consider enhancing the level of protection against discriminatory or disciplinary action afforded to private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities (Revised Recommendation I and V(C)(iv)).
 - (b) Take further steps to raise awareness within the public and private sectors of the availability of whistleblower protection, including awareness of the limitation upon the Ombudsman to take protective action concerning matters which are pending in court or in which a court has given a decision (Revised Recommendation I).
4. Regarding reporting of foreign bribery, the Working Group recommends that Israel:
 - (a) Consider taking appropriate measures to strengthen the detection of foreign bribery through the reporting of credible information relating to foreign bribery to law enforcement authorities, including through the possibility of establishing a statutory obligation for all public sector employees to report to law enforcement authorities information or suspicions that a serious

criminal offence is or has been committed by an Israeli company or individual, with an accompanying clarification that any such obligation applies to the reporting of foreign bribery (Revised Recommendation I).

- (b) Impose an obligation on the Military Censor to forward any information to law enforcement authorities and/or the Attorney General where that information has been suppressed by the Censor (whether in part or in full) and the information alleges the involvement of an Israeli company or individual in foreign bribery (Revised Recommendation I).
5. Regarding officially supported export credits, the Working Group recommends that the Israel Export Insurance Corporate Ltd (Ashr'a): (i) continue to undertake training on the detection of bribery and how to deal with clients who use foreign agents; and (ii) consider requiring clients to incorporate anti-bribery clauses when engaging sub-contractors (Revised Recommendation I and VI(ii)).
 6. Regarding detection within the defence industry, the Working Group recommends that Israel: (i) encourage the defence industry in Israel to develop strong anti-corruption measures and engage in international anti-corruption initiatives concerning the defence sector; (ii) ensure that, when providing licenses for exporting military equipment and dual-use goods, the Defense Export Controls Directorate of the Ministry of Defense considers whether applicants have been involved in bribery as well as the level of risk of corruption in relation to arms procurement in the destination country; and (iii) consider the temporary or permanent disqualification of enterprises convicted of bribing foreign public officials from applying for export licenses (Revised Recommendation I and VI(ii)).
 7. Regarding taxation, the Working Group recommends that Israel:
 - (a) Clarify the prohibition on the deductibility of payments made “in contravention of any law” by introducing an express denial of the deductibility of foreign bribe payments either in tax legislation or through another mechanism that is binding and publicly available (Revised Recommendation IV; 2009 Recommendation on Tax Measures I(i)).
 - (b) Expressly communicate to tax officials the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, including commissions, bonus, gratuities as well as non-documented expenses incurred abroad, through the issuance of guidelines or manuals, and training programs (2009 Recommendation on Tax Measures).
 - (c) Continue to include in existing and future tax treaties the Commentary to Article 26(2) of the OECD Model Tax Convention, allowing for the reciprocal sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities in relation to corruption offences (Revised Recommendation IV; 2009 Recommendation on Tax Measures).

Recommendations for Preventing and Detecting Bribery of Foreign Public Officials

8. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Israel:
 - (a) Take further steps as a matter of priority to ensure that the Police Legal Assistance Unit is adequately resourced to enable it to provide prompt and effective legal assistance (Convention, Article 9(1); Revised Recommendation VII).
 - (b) Complete without undue delay its preliminary enquiries concerning allegations of foreign bribery by Israeli companies, including through appropriate measures for the exchange of information

about these allegations with the foreign public officials' country, and decide whether to commence formal investigations into these matters (Convention, Article 5; Revised Recommendation I and VII(i)).

9. Regarding jurisdiction over the foreign bribery offence, the Working Group recommends that Israel:
 - (a) Given the stringent requirements of dual criminality for the application of nationality jurisdiction, ensure the full effectiveness of nationality jurisdiction, especially in the case of legal persons (Convention, Article 4(2)).
 - (b) Proceed promptly with the amendment of Article 291A of the Penal Law 1977 to include a specific reference to “a political entity that is not a State, including the Palestinian Authority” in the definition of a “Foreign State” (Convention, Article 4(1)).
10. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Israel ensure: (i) the active prosecution of legal persons who engage in foreign bribery, including State-owned or State-controlled companies; (ii) that the need to identify a natural person does not prevent effective investigation, prosecution and sanctioning of legal persons; and (iii) that the level of natural persons in respect of which the criminal liability of legal persons can be engaged is applied broadly enough to capture the situation of legal persons that have decentralised decision-making processes (Convention, Article 2; Revised Recommendation I).
11. Regarding accounting and auditing, the Working Group recommends that Israel:
 - (a) Take measures to encourage Israeli companies that are active in foreign markets to: (i) continue to develop and adopt adequate internal company controls and standards of conduct with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; and (ii) develop and strengthen monitoring bodies (such as audit committees) and ensure that they are independent of management and have the effective power and competence to fully perform their functions (Revised Recommendation V(C)).
 - (b) Take measures to encourage Israeli companies that are active in foreign markets to: (i) continue In consultation with relevant professional associations: (i) develop and implement more stringent requirements to effectively ensure the independence of external auditors; (ii) take steps to encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, in particular through guidelines and training for these professionals and through raising the awareness of management and supervisory boards of companies about these issues (Revised Recommendation V(B) and V(C)).
12. Regarding sanctions for foreign bribery, the Working Group recommends that Israel:
 - (a) Increase the level of penal sanctions available against natural persons convicted of the foreign bribery offence to provide for effective, proportionate and dissuasive sanctions (Convention, Article 3(1)).
 - (b) Increase the level of financial sanctions available against legal persons convicted of the foreign bribery offence to provide for effective, proportionate and dissuasive sanctions (Convention, Article 3(1)).
 - (c) Establish formal, written policies for denying ODA contracts and public procurement contracts to legal and natural persons who have been convicted of foreign bribery, and debarment of

defence industry companies convicted of foreign bribery (Convention, Article 3(4); Commentary paragraph 24; Revised Recommendation VI).

II. Follow-Up by the Working Group

13. The Working Group will follow up the issues below as practice develops:

- (a) The application by Israeli courts of the foreign bribery offence as an extension of the offence of domestic active bribery (Convention, Article 1).
- (b) The effectiveness in practice of territorial jurisdiction concerning offences committed in whole or in part abroad, in particular with regard to acts involving foreign subsidiaries (Convention, Article 4(1)).
- (c) The application of the judicial discretion on whether to convict legal persons, particularly as this applies to the potential creation of additional criteria for the liability of legal persons, to ensure that this cannot create an impediment to the effective implementation of Article 2 of the Convention (Convention, Article 2).
- (d) The exercise of judicial discretion in the determination of whether a conviction of a legal person would, in the particular circumstances, “help attain the desired social aims” with a view to ensuring that this does not include considerations contrary to Article 5 of the Convention.
- (e) The use of investigative techniques in foreign bribery investigations, including in the area of accessing bank records (Convention, Article 5; Revised Recommendation I).
- (f) The level to which Israel is able to provide prompt and effective legal assistance and respond to requests for extradition (Convention, Articles 9(1) and 10; Revised Recommendation VII).
- (g) The number of convictions for money laundering and the efficacy of “unusual activity reports” (Convention, Article 7).
- (h) The level of sentencing of natural and legal persons for the foreign bribery offence, and the application to natural persons of suspended sentences or conditional release in such cases (Convention, Article 3(1)).
- (i) The use of confiscation in foreign bribery cases (Convention, Article 3(3)).
- (j) The effectiveness of the reporting system by Israeli tax authorities, in particular as this applies to the requirement for prior authorisation from the Head of the Tax Authority (2009 Recommendation on Tax Measures II).
- (k) The effectiveness of having integrated the provisions on the maintenance of books and records in tax rules, in particular as this applies to the *mens rea* offence of false accounting (Convention, Article 8(1); Revised Recommendation V(A)).
- (l) The application in practice of new internal procedures adopted by Ashr’a, particularly as this applies to due diligence, and enhanced due diligence procedures where there are suspicions that applicants or clients have been or are involved in payment of bribes to foreign public officials.
- (m) The nature and extent of official development assistance projects undertaken by Israel, with a view to determining whether this is extended from the current mandate and practice of MASHAV

and whether further structures for the detection and prevention of foreign bribery should be implemented accordingly (Revised Recommendation I and VI(iii)).

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/60/10/44253914.pdf>

Italy (November 2004)

The Working Group is appreciative of Italy's hard work in preparing and hosting the on-site visit, and of their efforts to provide information throughout the examination process. Nevertheless, the Working Group regrets that Italy did not accede to the request of the lead examiners to visit Milan for one day to interview law enforcement representatives of that city with first-hand experience in foreign and domestic bribery cases, as well as Milan's significant financial and industrial sectors.

Based on its findings regarding Italy's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the recommendations to Italy under part 1, and (ii) will follow up the issues in part 2 when there are sufficient cases of foreign bribery in Italy.

I. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

1. With respect to promoting awareness of the Convention and the offence of bribing a foreign public official under article 322bis of the Italian Criminal Code, the Working Group recommends that Italy:

- a) Provide additional training to police, prosecutors and magistrates on the foreign bribery offence and increase efforts to promote awareness of the foreign bribery offence and the Convention in all the government agencies involved in the implementation of the offence, notably those dealing with Italian companies operating abroad (Revised Recommendation, Paragraph I);
- b) Remind all public official of their obligation under article 331 of the Code of Criminal Procedure to report suspicions of foreign bribery offences detected in the course of performing their duties to the law enforcement authorities and of the sanctions for a failure to report. (Revised Recommendation, Paragraph I);
- c) Sustain the current proactive awareness-raising activities by institutions such as the Ministry of Foreign Affairs through its diplomatic missions abroad, and pursue its initiatives to raise awareness in the private sector, notably where SMEs are concerned (Revised Recommendation, Paragraph I).

2. With respect to whistleblowing protection, the Working Group recommends that Italy consider introducing stronger measures to protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retribution (Convention, Article 5; Revised Recommendation, Paragraph I).

3. With respect to the prevention and detection of foreign bribery through accounting requirements, the Working Group urges the expeditious amendment of the provisions on false accounting in the Civil Code to ensure full conformity with article 8 of the Convention. In particular, Italy is recommended to ensure that its legislation provides effective, proportionate and dissuasive sanctions for all cases of false accounting regardless of (a) monetary thresholds, (b) whether the offence is committed in relation to listed

or non-listed companies, and (c) whether the offence causes damage to shareholders or creditors (Convention, Article 8).

4. With respect to the role of an independent external audit in the detection of foreign bribery, the Working Group recommends that Italy consider broadening the categories of companies subject to independent external audits to include certain non-listed companies with a high turnover, and ensure that “facts deemed to be censurable” in article 155 (2) of Decree 58/1998, which are required to be reported by external auditors to CONSOB (the regulator of the Italian securities market) and the board of directors of a company, include foreign bribery (Revised Recommendation, Paragraph V.B. (i), (iii) and (iv)).

5. With respect to the prevention and detection of foreign bribery through anti-money laundering measures, the Working Group urges the expeditious adoption of the bill criminalising money laundering by a person who commits the predicate offence, and establishing the liability of legal persons for money laundering (Convention, Article 7; Revised Recommendation, Paragraphs II.i and III).

6. With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Italy pay particular attention to information arising as a result of tax amnesty programmes in order to prevent the misuse of these programmes for the dissimulation of bribes (Revised Recommendation, Paragraph IV).

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

7. With respect to the prosecution and sanctioning of foreign bribery, the Working Group recommends that Italy:

- a) Amend its legislation to exclude the defence of *concussione* from the offence of foreign bribery (Convention, Article 1 and Commentary 1);
- b) Take the necessary steps to extend the length of the “ultimate” limitation period (*i.e.* the period of completion of prosecutions including all appeals) for the offence of foreign bribery (Convention, Article 6);⁶
- c) Encourage its officials at the Ministry of Justice who specialise in mutual legal assistance to work more closely with law enforcement in the preparation of outgoing requests for assistance, and organise meetings to facilitate an exchange of experiences and concerns amongst officials who are involved in mutual legal assistance (Revised Recommendation, Paragraphs II.vii and VII).

II. Follow-up by the Working Group

8. The Working Group shall follow-up the following issues once there has been sufficient practice in Italy:

- a) The effectiveness of the code of conduct of SACE (Italy’s export credit agency) in preventing foreign bribery (Revised Recommendation, Paragraph I);
- b) The application of the offence of *istigazione alla corruzione* and attempts to the foreign bribery offence in particular to verify whether it is committed irrespective of, *inter alia*, the value of the advantage and its results (Convention, Article 1; Commentary 7);

⁶ The Working Group notes that this is a general issue for many Parties.

- c) With respect to the prosecution of foreign bribery:
 - (i) Whether conflicts of competence amongst Italian public prosecutors lead to delays and a waste of resources, thereby decreasing the effectiveness of foreign bribery investigations (Revised Recommendation, Paragraph I);
 - (ii) Italy's ability to provide and obtain mutual legal assistance in foreign bribery investigations involving legal persons (Revised Recommendation, Paragraphs II.vii and VII);
 - (iii) The use of the powers of the Minister of Justice in deciding whether to assert nationality jurisdiction to prosecute a natural person (Convention, Articles 4 and 5).
- d) With respect to the liability of legal persons:
 - (i) Whether Italy can effectively prosecute legal persons in the following cases: 1. in the absence of proceedings against natural persons; 2. where the legal person is a state-owned or state-controlled company; 3. where a foreign legal person bribes a non-Italian official in Italy; and 4. where an Italian legal person uses a non-Italian national to bribe a foreign public official while outside Italy⁷ (Convention, Article 2);
 - (ii) The application of the “defence of organisational models” (*i.e.* the adoption of an organisational and management model, including internal control and compliance procedures, to prevent offences of the kind that occurred) (Convention, Article 2);
- e) With respect to sanctions, the level of sanctions applied to natural and legal persons, including the level of fines, application of confiscation, prohibitive sanctions, suspended sentences and the use of patteggiamento based on information provided by Italy (Convention, Article 3);
- f) With respect to the power of the *Corte dei Conti* (State Audit Court) to audit public bodies, the application of that power to public or publicly-managed entities (1) involved in international transactions, (2) involved in contracting opportunities with Italian companies through public procurement or development aid, and (3) that are not subject to an external audit requirement (Revised Recommendation, Paragraph V.B.(i)).

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/0/50/33995536.pdf>

Report on progress since November 2004:

<http://www.oecd.org/dataoecd/30/36/38313133.pdf>

⁷

The Working Group notes that this is a general issue for many Parties.

Japan (Phase 2: March 2005; Phase 2bis: June 2006)

PHASE 2

The Working Group appreciates the efforts made by Japan since the Phase 1 examination to amend its laws concerning and related to the offence of bribing a foreign public official to rectify areas in which the Working Group deemed it was not in compliance with the Convention. The Working Group also acknowledges the efforts made by the Japanese authorities to translate legislation and documents throughout the examination process, and provide timely responses to the draft Phase 2 Report of the lead examiners.

At the December 2004 Working Group meeting, the Working Group found that the Japanese Government had failed to provide sufficient information to enable it to perform an objective assessment of Japan's implementation of the Convention, as the Japanese authorities did not disclose the existence or non-existence of any foreign bribery investigations due to a claim of secrecy. Thus, the Working Group recommended that Japan provide within 30 days non-identifying information about non-"filed" investigations of bribing foreign public officials (i.e. the number of such investigations opened and closed, the reasons for closing any such cases, and the legal, evidentiary, mutual assistance, and other problems encountered in such investigations). Pursuant to this recommendation, the Japanese authorities submitted limited non-identifying information about four investigations which are no longer in progress. The Working Group notes that the Japanese authorities only canvassed three major District Public Prosecutors Offices and three major Police Prefectures about the existence of non-"filed" investigations. It also notes that essentially the only information disclosed about these four investigations was that the Japanese authorities did not pursue the investigations mainly due to the absence of nationality jurisdiction for foreign bribery and because of inadequate evidence.

In light of the information provided during the Phase 2 review, including the follow-up information presented by Japan at the Working Group meeting of January 2005, it is the finding of the Working Group that Japan has not demonstrated sufficient efforts to enforce the offence of bribing a foreign public official. However, the Japanese authorities stated that, since nationality jurisdiction came into force in January 2005, they will now be able to pursue foreign bribery cases more aggressively.

In view of these circumstances, another on-site evaluation will need to take place in Japan in approximately one year for the purpose of reviewing efforts that have been made to investigate and prosecute foreign bribery cases. The on-site visit shall be approximately two to three days and shall include meetings with prosecutors, police officers and other persons and bodies deemed relevant by the lead examiners with respect to non-filed investigations reported at the January 2005 meeting, as well as new investigations. The Working Group expects that the Japanese authorities will disclose during the on-site evaluation, the concrete but non-identifying information about the nature of any problems encountered in investigating and prosecuting foreign bribery cases, as well as how the relevant laws have been applied in practice, in particular those on the establishment of nationality and territorial jurisdiction. The Working Group further expects that the Japanese authorities will provide at the on-site visit all relevant non-identifying information about "filed" as well as non-"filed" investigations, including:

- (i) The time frame of the offences and the investigations, including the time spent investigating the cases,
- (ii) Whether access to financial records and MLA was requested, and if not why,
- (iii) Whether suspects and witnesses were interviewed, and if not why,

- (iv) Whether search warrants were served to obtain access to company records or other evidence, and if not why,
- (v) Whether information was requested from the tax authorities, and if not why, and
- (vi) How the police and prosecutors co-ordinated in the investigation.

The Working Group recommends that the Japanese authorities assess as a priority the impediments to effective investigation and prosecution. In this regard, based on the information provided by Japan during the January 2005 meeting, the Working Group urges Japan to make use of MLA at the non-“filed” investigation stage, increase co-ordination of the law enforcement efforts between prosecution and police, and address any difficulty encountered in establishing and enforcing territorial jurisdiction in order to enable Japan to advance non-“filed” investigations concerning foreign bribery offences.

Having regard to the object and purpose of the Convention, the Working Group also recommends that the Japanese authorities assess if and how the Japanese law prevents disclosure of non-identifying information concerning the investigation and prosecution of foreign bribery offences. The Working Group stresses that such disclosure is a necessary pre-condition for an effective monitoring mechanism as provided for in article 12 of the Convention.

In addition, based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Japan, the Working Group (i) makes further recommendations to Japan under Part I, and (ii) will follow-up the issues under Part II where there has been sufficient practice in Japan.

I. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

1. With respect to promoting awareness of the Convention and the offence of bribing a foreign public official established in the *Unfair Competition Prevention Law* (UCPL), the Working Group recommends that Japan make efforts to increase the awareness of:

- a) key agencies including the Ministry of Economy, Trade and Industry (METI), Ministry of Justice, Ministry of Foreign Affairs and Ministry of Finance about the important links between foreign bribery and other areas of government activity, such as public procurement, export credit, official development assistance and anti-monopoly cases;
- b) police and prosecutors through training specifically targeting the foreign bribery offence either separately or in the context of overall anti-corruption and corporate crime training;
- c) agencies involved in contracting relationships with companies doing business abroad including the Japan Fair Trade Commission (JFTC), Securities and Exchange Commission (SESC), Financial Services Agency (FSA), Japan Bank for International Co-operation (JBIC), Nippon Export and Investment Insurance Agency (NEXI), and Japan International Co-operation Agency (JICA); and
- d) the legal profession. (Revised Recommendation, Paragraph I)

2. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that Japan:

- a) Consider establishing, notwithstanding the secrecy provisions under the National Public Service Law and the Local Public Service Law, an obligation for all public officials; and establishing procedures requiring all employees of relevant entities including JBIC, NEXI and JICA, to report as a matter of course to the law enforcement authorities any payments suspected of being bribes to foreign public officials; (Revised Recommendation, Paragraph I)
 - b) Establish as a matter of priority a formal system to enable METI to effectively process allegations of foreign bribery and pass them on to the law enforcement authorities, given its role as the government agency responsible for the implementation of the UCPL, which includes the foreign bribery offence, and the METI Guidelines and the resulting likelihood that it will receive allegations; (Revised Recommendation, Paragraphs I and II)
 - c) Clarify that external auditors are required to report indications of possible illegal acts of bribery to management and, as appropriate, to corporate monitoring bodies, and consider providing an exception to the duty of confidentiality by requiring external auditors to report indications of a possible illegal act of bribery to competent authorities;⁸ (Revised Recommendation V.B.(iii) and (iv))
 - d) In applying its legislation in the field of whistle-blowing, improve the protection of persons who report directly to the law enforcement authorities; and pursue its efforts to make such measures more widely known among companies and the general public; (Revised Recommendation, Paragraph I) and
 - e) Consider establishing a centralised mechanism for the purpose of facilitating the sharing of information and co-ordination of investigations and prosecutions of transnational bribery cases.
3. With respect to the prevention and detection of foreign bribery through accounting requirements, external audit and internal company controls, the Working Group recommends that Japan:
- a) Ensure that all of the activities listed under article 8.1 of the Convention are prohibited, including the establishment of off-the-books accounts and the recording of non-existent expenditures, for the purpose of bribing foreign public officials or of hiding such bribery, and ensure the provision of effective, proportionate and dissuasive penalties for such omissions and falsifications; (Convention, Article 8) and
 - b) Encourage the development and adoption of adequate internal company controls, including standards of conduct, and provide companies with more guidance concerning the establishment of effective internal auditing and supervisory mechanisms (including how to respond to solicitation from foreign public officials). (Revised Recommendation, Paragraph V.B.)
4. With respect to the detection and prevention of foreign bribery through money laundering legislation, the Working Group recommends that the Government of Japan encourage the *Diet* (Parliament) to pass as a matter of priority the Bill to amend the *Anti-Organised Crime Law* in order to include the proceeds of bribing a foreign public official in the definition of “crime proceeds” for the purpose of the application of the money laundering offences. (Convention, Article 7)

⁸ The Working Group notes that this is a general issue for many Parties.

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

5. With respect to the implementation of the offence of bribing a foreign public official under the UCPL, the Working Group recommends that Japan:

- a) Through its Supreme Public Prosecutors Office, undertake an internal review of the reasons for the absence of “filed” investigations and prosecutions of foreign bribery cases; (Convention, Article 5, Revised Recommendation, Paragraph I and II i)
- b) Review the interpretations of “facilitation payments” and “international business transactions” provided in the METI Guidelines and all other relevant guidance issued by the Japanese authorities including METI, to ensure that they conform to the Convention and Commentaries on the Convention and do not mislead companies about what acts are covered by the foreign bribery offence. The Working Group further recommends that METI conduct this review in consultation with the Ministry of Justice and other relevant ministries as well as with the prosecutorial authorities through the Ministry of Justice; (Convention, Article 1)
- c) Consider clarifying that all cases where a foreign public official directs the transmission of the benefit to a third party are covered, not just those where the official receives “in substance” the benefit; (Convention, Article 1)
- d) Take necessary steps to extend to an appropriate period the statute of limitations applicable to the offence of bribery of foreign public officials so as to ensure the effective prosecution of the offence; (Convention, Article 6) and
- e) Compile statistical information on the sanctions imposed for violations of the foreign bribery offence under the UCPL, including the confiscation of the bribe, suspension of sanctions and use of the summary procedure. (Convention, Article 3.1 and 3.3)

6. With respect to the tax treatment of bribes to foreign public officials, the Working Group is not sufficiently satisfied that Japan is in full compliance with the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, and therefore recommends that Japan enact legislation or amend its regulations as a matter of priority to effectively prohibit the tax deductibility of any bribe payments to foreign public officials made by any individuals or companies of any size. (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

II. Follow-up by the Working Group

7. The Working Group will follow-up the following issues once there has been sufficient practice:

- a) Developments in Japanese law with respect to the recommendations of the Subcommittee on Corporate Activities related to International Business Transactions, Trade and Economic Co-operation Committee, Industrial Structure Council, including the recommendation to undertake a study of the appropriateness of including the foreign bribery offence in the UCPL. It is also recommended that Japan report the findings of the study to the Working Group. (Convention, Article 1)
- b) Whether (i) a legal person is liable where the bribe is for the benefit of a company related to the legal person from which the bribe emanated, (ii) the liability of a legal person depends upon the conviction or punishment of the natural person who perpetrated the offence, and (iii) legal persons are subject to the new provision on nationality jurisdiction; (Convention, Article 2)

- c) Whether the sanctions imposed pursuant to the UCPL for the foreign bribery offence as a whole are effective, proportionate and dissuasive taking into account: (i) monetary sanctions, and (ii) the application of the expected amendment to the AOCL for confiscating the proceeds of bribing a foreign public official; (Convention, Article 3.1 and 3.3)
- d) The anti-money laundering system focusing on: (i) the absence of coverage of some non-financial businesses and professions from the reporting requirements; (ii) the penalties for the single failure to make a “Suspicious Transaction Report” or perform customer identification; (iii) the obligation under article 239(2) of the Code of Criminal Procedure for public officials to make an “accusation” to the law enforcement authorities when they consider that there exists an offence; and (iv) the level of feedback from the law enforcement authorities concerning suspicious transactions reports made to them; (Convention, Article 7) and
- e) The policies of agencies such as JBIC, NEXI and JICA and Japan’s public procurement authorities on dealing with applicants convicted of foreign bribery or otherwise determined to have bribed a foreign public official, to determine whether these policies are a sufficient deterrence. (Convention Article 3.2; Revised Recommendation Articles II(v) and VI)

PHASE 2BIS

I. Main Findings of the Working Group

Pursuant to the Phase 2 Recommendations of the Working Group, the purpose of the Phase *2bis* on-site visit to Japan in February 2006 was to review efforts that have been made to investigate and prosecute foreign bribery cases, due to the finding of the Working Group in Phase 2 (January 2005) that Japan had not demonstrated sufficient efforts to enforce the offence of bribing a foreign public official. In order to make the assessment mandated by the Phase 2 Recommendations, the Phase *2bis* examination of Japan focused on three main issues: (i) the level of Japan’s co-operation in the Phase *2bis* examination; (ii) the level of concern by the Japanese authorities regarding the absence of formal investigations and prosecutions; and (iii) the factors contributing to the absence of formal investigations and prosecutions. The main findings of the Working Group are as follows:

Japan made fully satisfactory efforts to co-operate in the Phase *2bis* on-site visit, including through the level of participation and disclosure of relevant information, including disclosure, within the limits of Japanese laws on confidentiality, of non-identifying information regarding the non-filed investigations reported in January 2005.

Japan made progress in strengthening the legal framework for fighting the bribery of foreign public officials, in particular through legislative amendments to increase the statute of limitations in respect of natural and legal persons for the foreign bribery offence, and the establishment of an enhanced false accounting penalty under the Securities and Exchange Law. In addition, in light of the longstanding concern of the Working Group about the current tax treatment of bribe payments in the Special Taxation Measures Law, the passage of the Bill to amend the Corporation Tax Law and Income Tax Law to expressly deny tax deductions for bribe payments to foreign public officials in all circumstances is a significant step. Revisions of the Ministry of Economy, Trade and Industry (METI) Guidelines to remove certain unclear and potentially misleading information about the foreign bribery offence, and the Cabinet Order specifying that the new Whistleblower Protection Act applies to offences under the UCPL, are also important steps. However, the legislative framework for fighting foreign bribery requires further strengthening in order to ensure full compliance with the relevant Phase 2 Recommendations. In addition, the Working Group has serious concerns that the placement of the offence of bribing a foreign public

official in the UCPL as opposed to the Penal Code has in practice reduced its priority and contributed to the absence of formal investigations and prosecutions.

The Japanese authorities made reasonable efforts to raise the awareness of the relevant authorities, including police and prosecutors, of the application, since January 2005, of nationality jurisdiction to the foreign bribery offence under the UCPL. Otherwise, the Working Group is not persuaded that Japan's legislative framework is adequate for applying nationality jurisdiction to legal persons for the foreign bribery offence, given that nationality jurisdiction does not expressly apply to legal persons for the offence and that there are no precedents for such an application in respect of any other offences.

Despite the continuing absence of formal investigations and prosecutions seven years after the foreign bribery offence came into force, Japan has not made a serious effort to act on the Phase 2 Recommendation of the Working Group to assess as a priority the impediments to the effective investigation and prosecution of the offence of bribing a foreign public official. It is particularly regrettable that the Japanese authorities were not motivated to do so under the circumstances of an impending Phase 2bis on-site visit. Given the foregoing and that neither METI nor the Ministry of Justice consider such an assessment their responsibility, as well as that the Ministry of Justice has informally concluded that there are no issues or problems to be resolved, serious doubts continue about the level of Japan's commitment to the effective implementation of the Convention.

Moreover, based on confidential discussions with the Japanese authorities concerning the non-filed investigations reported in Phase 2 and responses to questions of the lead examiners regarding other possible allegations, it is the finding of the lead examiners that before the Phase 2 examination in January 2005, the Japanese authorities took a passive approach to foreign bribery allegations, and since January 2005, efforts may have increased, but certainly not to a sufficient degree.

II. Recommendations of the Working Group

Recommendations to Japan

1. The Working Group recommends that Japan should be proactive in investigating allegations of foreign bribery, with the goals of advancing investigations and bringing prosecutions, and recommends the following specific measures be taken to actively pursue evidence in foreign bribery cases involving Japanese interests:

- a) use non-compulsory investigative measures at the earliest possible stage, such as witness interviews and requests for the voluntary disclosure of financial records, including in the absence of sufficient evidence to meet the burden of proof to obtain warrants for compulsory investigative measures;
- b) seek mutual legal assistance at the earliest possible stage to obtain non-compulsory investigative measures, including in the absence of sufficient evidence to meet the burden of proof to obtain warrants for compulsory investigative measures
- c) increase coordination and communication between the public prosecutors' offices and the National Police Agency concerning the foreign bribery offence, for the purpose of ensuring an effective flow of information between police and prosecutors about ongoing and potential foreign bribery enquiries or investigations, as well as seriously consider increasing the involvement of the police in foreign bribery investigations, including where the cases are not referred to prosecutors by the police; and

- d) specifically include in the ongoing research by the Ministry of Justice on how to increase the effectiveness of investigative measures, consideration of the foreign bribery offence, in particular regarding the potential use of wire-tapping and grants of immunity, bearing in mind that because most of the evidence in foreign bribery cases is available abroad, it may be difficult to secure adequate evidence for prosecution in the absence of greater investigative powers.

2. The Working Group recommends that Japan urgently co-ordinate and undertake an objective assessment of the legal and procedural impediments to the effective investigation and prosecution of the offence of bribing a foreign public official in Japan, and present in writing the findings of the assessment to the Working Group within six months of the Phase 2bis examination in the Working Group. In making this assessment, the Working Group recommends that the Japanese authorities, in consultation with appropriate members of civil society, assess possible impediments and give full consideration to the findings and recommendations in the Phase 2 and Phase 2bis reports on Japan, paying particular attention to the impressions of the lead examiners regarding what could be the factors contributing to the absence of formal investigations and prosecutions, including their findings as described in the preceding paragraph.

3. In order to further strengthen the legislative framework for fighting foreign bribery, ensure full implementation of the relevant Phase 2 Recommendations, and increase the priority of the foreign bribery offence, the Working Group recommends that the Japanese authorities take the following steps:

- a) enhance the visibility and enforcement of the foreign bribery offence as a matter of priority, notably by moving the foreign bribery offence from the UCPL to the Penal Code;
- b) delete from the 2006 METI Guidelines the interpretation of “international business” for the purpose of the foreign bribery offence, which refers to “business repeatedly and continuously conducted” for the “purpose of profit”, and make it absolutely clear in the Guidelines that Japanese law does not permit an exception for facilitation payments;
- c) revisit the issue identified in the Phase 2 Report regarding the standard of liability of materiality applicable to the offence of making a false statement in disclosure documents under the Securities and Exchange Law, and ensure that Japanese law fully complies with Article 8 of the Convention; and
- d) take appropriate measures to ensure that public and private employees are aware that the Whistleblower Protection Act applies, not only to internal acts of whistle-blowing, but to acts of whistle-blowing to police and prosecutors as well.

Recommendation for Follow-Up by the Working Group

4. The Working Group recommends follow-up of the following matters as practice develops:
- a) the application of nationality jurisdiction to legal persons for the foreign bribery offence; and
 - b) the use of confessions in foreign bribery investigations and prosecutions, as well as whether there are any particular difficulties in establishing the voluntariness of confessions in foreign bribery cases at trial.

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/34/7/34554382.pdf>

Complete Phase *2bis* Report available at:

<http://www.oecd.org/dataoecd/54/23/37018673.pdf>

Report on progress since June 2006

<http://www.oecd.org/dataoecd/49/44/39591489.pdf>

Korea (November 2004)

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Korea, the Working Group (i) makes the recommendations to Korea under part 1, and (ii) will follow-up the issues in part 2 when there has been sufficient practice in Korea in respect of cases involving the bribery of foreign public officials.

I. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

1. With respect to promoting awareness of the Convention and the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA), the Working Group recommends that Korea takes steps to increase awareness of the investigative, prosecutorial and judicial authorities, including the provision of training programmes on the Convention and the FBPA for current and future members of these bodies; agencies indirectly involved in implementing the Convention; and SMEs, particularly through agencies that advise and support them (Revised Recommendation, Paragraph I).

2. With respect to the prevention and detection of foreign bribery through accounting requirements, external audit and internal company controls, the Working Group recommends that Korea:

- a) Considers requiring the reporting of indications of bribery to the competent authorities by external auditors or management committees (Revised Recommendation, Paragraphs V.B.iii and iv);⁹ and
- b) Considers ensuring that government and government-funded agencies that provide contracting opportunities to Korean companies, such as the Korea Export Insurance Corporation (KEIC), the Export-Import Bank and the Korea International Cooperation Agency (KOICA), have the authority to audit companies suspected or convicted of bribing foreign public officials to determine whether funds obtained from the agency have been used as part or all of the bribe (Revised Recommendation, Paragraph V.B.i).

3. With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Korea:

- a) Considers extending the whistleblower protection provided by the Anti-Corruption Act to those who report foreign bribery to KICAC, and to those who report suspicions of foreign bribery to government agencies other than KICAC (Revised Recommendation, Paragraph I);
- b) Reviews the disclosure policies and procedures of the Korea International Cooperation Agency to ensure that there is disclosure to the competent authorities where, in the course of transacting

9. The Working Group notes that this is a general issue for many Parties.

business with a company, credible evidence arises that a violation of the FBPA has occurred (Revised Recommendation, Paragraph I);¹⁰

- c) Ensures Korean overseas representations are more pro-active in making Korean companies doing business in foreign markets aware of the Convention and the FBPA, and advises Korean overseas representations on the steps that should be taken (including reporting the matter to competent authorities) when there are credible allegations that a Korean company or individual has bribed or taken steps to bribe a foreign public official (Revised Recommendation, Paragraph I);¹¹ and
 - d) Ensures that the defence of social customs under article 20 of the Criminal Act is not applicable to the offence of foreign bribery under the FBPA (Convention, Article 3.1).
4. With respect to measures to disallow the deductibility of bribe payments to foreign public officials, the Working Group recommends that Korea:
- a) Amends its tax legislation to clarify that bribes to foreign public officials in violation of the FBPA are not tax-deductible (Revised Recommendation, Paragraph IV); and
 - b) Communicates effectively to tax examiners (through training programmes, guidelines or manuals, and distribution of the OECD Bribery Awareness Handbook for Tax Examiners) the non-deductibility of bribes and the need to be attentive to any outflows of money from a taxpayer that could represent bribes to foreign public officials (Revised Recommendation, Paragraphs I and IV).

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

5. With respect to measures for ensuring the effective prosecution of foreign bribery offences, the Working Group recommends that Korea:
- a) Clarifies that article 3.1 of the FBPA covers the situation where a bribe is transmitted directly to a third party, consistent with the offence of bribing a domestic public official under the Criminal Act (Convention, Article 1.1); and
 - b) Reviews the Explanatory Manual published by the Ministry of Justice to ensure that the guidelines contained therein are consistent with the Convention and the FBPA (Convention, Article 1.1).
6. With respect to measures for ensuring effective sanctioning of foreign bribery offences and accounting and auditing offences (where relevant), the Working Group recommends that Korea:
- a) Takes steps to ensure that the actual fines for foreign bribery are effective, proportionate and dissuasive, especially in light of the absence of the confiscation of the proceeds of bribery, and considers increasing the penalties for false accounting and fraudulent auditing (Convention, Articles 3.1 and 8.2; Revised Recommendation, Paragraph V.A.iii);

10. The Working Group notes that this is an issue for many Parties. The recommendation shall not be interpreted as a suggestion that the policies of the Korea International Cooperation Agency do not meet the standards set out in the Recommendations of the Development Co-operation Directorate.

11. The Working Group notes that this is a general issue for many Parties.

- b) Compiles statistical information on the sanctions imposed for violations of the FBPA, including confiscation of bribes and suspensions of sentences (Convention, Articles 3.1 and 3.3); and
- c) Ensures that the authorities responsible for development aid and privatisation can take appropriate actions, such as considering informing the competent authorities and the possible addition of non-criminal sanctions, where persons and companies are determined to have bribed foreign public officials (Convention, Article 3.4; Revised Recommendation, Paragraph VI.ii).¹²

II. Follow-up by the Working Group

7. The Working Group will follow-up the following issues once there has been sufficient practice under the FBPA:

- a) With respect to the offence of bribing a foreign public official under the FBPA, application of the following:
 - (i) The exception for “small pecuniary or other advantages” (Convention, Article 1.1; Commentary 9 on the Convention);
 - (ii) Jurisprudence that provides an exception to bribery where a payment or gift is offered as a social courtesy (Convention, Article 1.1);
 - (iii) Non-applicability of the law on attempts to foreign bribery, including attempts through intermediaries (Convention, Article 1.2);
 - (iv) The definition of “foreign public official” to persons performing public functions for foreign public enterprises, in particular the interpretation of “de facto or effective control” by a foreign government(s), and the non-application of the definition to the bribery of North Korean public officials (Convention, Article 1.4; Commentary 14 on the Convention); and
 - (v) The adequacy of the statute of limitations for the foreign bribery offence (Convention, Article 6).
- b) With respect to the liability of legal persons for the offences of bribing a foreign public official pursuant to article 4 of the FBPA and fraudulent accounting pursuant to article 21 of the Act on External Audit of Stock Companies, the application of these provisions (where appropriate) to the following situations:
 - (i) A bribe is given by a representative, agent, employee, etc. of a legal person in relation to the business of another legal person in the same enterprise group (chaebol) (Convention, Article 2);
 - (ii) A legal person pays due attention or exercises proper supervision to prevent foreign bribery (Convention, Article 2);

12. This recommendation shall not be interpreted as a suggestion that the policies of the Korea International Cooperation Agency do not meet the standards under the Recommendations of the Development Co-operation Directorate.

- (iii) A conviction/sanction has not been imposed on the natural person responsible for the offences of foreign bribery and fraudulent accounting (Convention, Articles 2 and 8.2); and
- (iv) Foreign bribery that is committed abroad, including bribery by a natural person who is not a Korean national where the legal person has been complicit in the bribery offence (Convention, Articles 2 and 4.1).
- c) Sanctions under the FBPA, particularly regarding (1) the determination of profit in calculating the fine, where the profit exceeds the prescribed thresholds; and (2) the impact of the absence of authority to confiscate the proceeds of bribery (Convention, Articles 3.1 and 3.3);
- d) The application of the money laundering offence to the laundering of funds and property related to violations of the FBPA, including the laundering of proceeds of foreign bribery obtained by the briber and laundering in relation to violations of the FBPA perpetrated by legal persons (Convention, Article 7; Revised Recommendation, Paragraphs II.i and III);
- e) The effectiveness of Korea's money laundering reporting system, particularly in view of (i) the monetary thresholds for reporting suspicious transactions; (ii) the absence of coverage of non-financial businesses and professions; (iii) the information in guidelines and typologies concerning foreign bribery; (iv) the level of resources of KoFIU; and (v) the exclusion of proceeds of foreign bribery from the notion of "criminal proceeds" (Revised Recommendation, Paragraph I); and
- f) The application of the Framework Act on National Taxes and the Criminal Procedure Act to disclosure by the National Tax Service to the competent authorities of evidence of foreign bribery detected during tax audits spontaneously without any requests (Revised Recommendation, Paragraph I).

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/17/13/33910834.pdf>

Report on progress since November 2004:

<http://www.oecd.org/dataoecd/34/15/38239546.pdf>

Luxembourg (May 2004; Phase 2bis March 2008)

In conclusion, based on the findings of the Working Group with respect to Luxembourg's application of the Convention and Revised Recommendation, the Working Group makes the following recommendations to Luxembourg. In addition, the Working Group recommends that certain issues be revisited as case law evolves.

I. Recommendations

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

1. With respect to awareness raising activities to promote the implementation of the Law of 15 January 2001 relating to corruption and amending the Criminal Code, the Code of Criminal Procedure and the Act of 4 December 1967 on Income Tax, the Working Group recommends that Luxembourg:

- a) Take necessary measures, in cooperation with the professional organisations and the business circles concerned, to raise awareness among the private sector regarding the offence of bribery of foreign public officials, and promote the implementation within enterprises of preventive organisational measures – internal control mechanisms, ethics committees, and warning systems for employees –, as well as the adoption of codes of conduct specifically addressing the issue of foreign bribery. [Revised Recommendation, Articles I and V.C.(i)]
- b) Take necessary measures to raise awareness of the offence among the administration, notably among those officials that may play a role in detecting and reporting acts of bribery and those in contact with Luxembourg enterprises exporting or investing abroad (in particular diplomatic missions of Luxembourg abroad), the Luxembourg public and professional bodies. [Revised Recommendation, Article I]

2. With respect to detection, the Working Group recommends that Luxembourg:

- a) Issue regular reminders to public officials of their obligation under article 23 (2) of the Code of Criminal Procedure to inform prosecuting authorities of any offence of bribery of a foreign public official that they may become aware of in the exercise of their duties, and of disciplinary sanctions applicable in the event of non-compliance with this obligation, and ensure effective application of such sanctions. [Revised Recommendation, Article I]
- b) Encourage the implementation of a similar reporting procedure to the prosecuting authorities for officials not subject to the provisions of article 23 (2) of the Code of Criminal Procedure working for bodies vested with supervisory powers with regard to corruption in the attribution of public subsidies (notably certain officials of the Ducroire and Lux Développement). [Revised Recommendation, Articles I and II.(v)]
- c) Develop clear instructions for the Tax Administration prescribing verifications to be carried out in order to detect possible offences of bribery of foreign public officials, and remind these officials of their obligation to alert the prosecuting authorities of any offence that they may

become aware of in this regard, and ensure that sufficient human and financial resources are made available to the tax authorities for effective controls. [Revised Recommendation, Articles II.(ii) and IV]

- d) Adopt measures to ensure effective protection of any person collaborating with the law enforcement authorities, notably employees who report in good faith suspected cases of bribery. [Revised Recommendation, Article I]
- e) Given the particular importance of the Luxembourg financial centre, continue ongoing efforts in the context of the Action Plan against Money Laundering in order to ensure rigorous implementation by the entire banking and financial sector of legislative and regulatory measures aimed at preventing and detecting money laundering of funds that may be related to the bribery of foreign public officials on international markets, and ensure that non-compliance with the legal obligation to report be sanctioned in a dissuasive manner. [Convention, Article 7; Revised Recommendation, Article II.(iv)]
- f) Bearing in mind the important role of accounts auditing in the detection of suspicious operations related to bribery of foreign public officials, and in the context of ongoing efforts by Luxembourg aimed at ensuring greater transparency in corporate accounting, ensure compliance by accountants and external and internal auditors with their obligation to inform prosecuting authorities of any suspected money laundering related to corruption. In this regard, Luxembourg authorities are invited to further raise awareness of such professionals to the provisions of the anti-bribery legislation, notably by introducing stricter auditing procedures, and to ensure that non-compliance with the reporting obligation be effectively sanctioned. [Convention, Article 8; Revised Recommendation, Articles I et V]
- g) Establish effective interdisciplinary cooperation and coordination among the bodies concerned (administrative, financial and law enforcement) with regard to supervisory, detection and sanctioning powers, and, in this regard, ensure that professional secrecy does not constitute an impediment. [Revised Recommendation, Article I]

Recommendations for ensuring adequate mechanisms for the effective prosecution of offences of bribery of foreign public officials and related offences

3. With respect to prosecution, the Working Group recommends that Luxembourg:

- a) Grant determined financial support with a view to ensuring sufficient human and financial resources as well as specific training to law enforcement professionals (police, prosecution, investigating magistrates and judges) to guarantee effective prosecution of the foreign bribery offence and related offences, notably those related to accounting, without prejudice to the execution of request for mutual legal assistance [Convention, Articles 5 and 9; Revised Recommendation, Article I; Annex to the Revised Recommendation, Paragraphs 6 and 8]
- b) Compile relevant statistical information regarding the number, source and treatment of bribery offences (prosecution, judgment and sanction) in order to facilitate evaluation, and, if necessary, develop criminal policy in this regard. [Revised Recommendation, Article I]
- c) In order to ensure effective prosecution of offences of active bribery of foreign public officials, and given the currently limited investigative powers at the preliminary enquiry stage, firstly, consider extending such powers, and, secondly, ensure that, at the stage where investigation is initiated, the threshold taken into account by the prosecuting authorities is not too high

concerning the level of proof gathered in the course of the enquiry. [Convention, Article 5; Revised Recommendation, Article I]

- d) Formally remind prosecuting authorities (via circulars or directives, or any other official channel) of the importance of prosecuting bribers, as an essential condition for the effective application of the foreign bribery offence, and, similarly, draw their attention to the importance of prosecuting money laundering offences related to bribery on foreign markets, without referring to the place of occurrence of the predicate offence or to the place of residence of the alleged offender. [Convention, Articles 1, 3 and 5; Revised Recommendation, Article I; Convention, Articles 8 and 9; Revised Recommendation, Articles I, II.(iii), and V.A.(iii)]
- e) Taking note of Luxembourg's continued non-compliance with Article 2 of the Convention, establish in Luxembourg law a clear liability of legal persons for bribery of foreign public officials within a year of the Phase 2 evaluation of Luxembourg, and put in place sanctions that are effective, proportionate and dissuasive. [Convention, Articles 2 and 3]

4. With respect to sanctions, the Working Group recommends that Luxembourg:

- a) Raise awareness among prosecuting authorities on the importance of rigorously applying the range of sanctions provided for in criminal law which may be effective and dissuasive with respect to corruption, including confiscation measures, and encourage prosecuting authorities to lodge the range of appeals provided for under the law, should the decisions handed down be too lenient. [Convention, Article 3; Revised Recommendation, Article I]
- b) Raise awareness among tax authorities regarding the importance of making rigorous use of all sanctions available under the Luxembourg tax legislation in order to deter any attempt on the part of taxpayers to pass bribes paid abroad as deductible charges. [Revised Recommendation, Article IV]

II. Follow-up by the Working Group

5. The Working Group will follow-up in the issues below, as case law and practice develop, in order to assess:

- a) Whether the current terms – “without right” and case law concept of “corruption pact” – are sufficiently clear to allow for effective prosecution of the foreign bribery offence. [Convention, Article 1]
- b) To what extent bribers are being prosecuted and the application of sanctions handed down, notably with regard to confiscation, in order to determine whether these sanctions are sufficiently effective, proportionate and dissuasive to prevent and combat the offence of bribery of foreign public officials. [Convention, Articles 1 and 3]

6. The Working Group requests the Luxembourg authorities to report, in accordance with the Phase 2 Guidelines, on measures taken to fulfil the recommendations by the Group, and reserves the right to conduct a second on-site evaluation of Luxembourg, in view of the reports by Luxembourg authorities.

PHASE 2BIS

7. The Phase 2bis report on Luxembourg assesses the measures taken by Luxembourg to meet those recommendations from Phase 2 that the OECD Working Group on Bribery had deemed inadequately implemented in its Phase 2 written follow-up report. The Working Group is particularly concerned about

the fact that Luxembourg has still not responded to some key Phase 1 and Phase 2 recommendations. While the Working Group notes that Luxembourg has recently engaged in efforts to implement the Convention, it is seriously concerned that Luxembourg has not responded to some key recommendations issued by the Working Group since 2001.

8. On the basis of the Working Group's observations on Luxembourg's application of recommendations 1, 2, 3, 4, 5, 6, 8, 9 and 14 from Phase 2, the Working Group has concluded that recommendations 2, 4 and 8 have been implemented or handled satisfactorily. The Working Group notes, however, that five other recommendations (recommendations 1, 3, 5, 6 and 9) from the Phase 2 examination have not been fully implemented. The Working Group notes further that Luxembourg has still not implemented the Phase 1 and Phase 2 recommendations related to the liability of legal persons for foreign bribery (Phase 2 recommendation 14).

9. The Working Group is particularly concerned about the continuing absence of liability for legal persons that engage in bribery. While a bill has been placed before Parliament dealing with the criminal liability of legal persons, the report highlights gaps in the bill which, if adopted in its current state, would fall short of the requirements of the Convention. Considering the seriousness of the situation, the Working Group has decided that, within one year, Luxembourg will report, in writing, on measures taken to fulfil the recommendations of the Group, and reserves the right, in the event of continued failure to implement the Convention, to take further steps.

10. On the basis of the Working Group's observations on Luxembourg's application of recommendations 1, 3, 5, 6, 9 and 14 from Phase 2, the Working Group, in the context of Phase 2^{bis}, makes the following recommendations to Luxembourg:

Recommendations to ensure effective prevention and detection of the bribery of foreign public officials

11. With respect to raising awareness of transnational bribery among the economic circles and professional organizations concerned (Recommendation 1 from Phase 2), the Working Group recommends that Luxembourg:

- a) conduct activities, in association with business circles concerned, to raise awareness of the anti-bribery provisions of Luxembourg law among small and medium-sized enterprises that may engage in international trade, and monitor the awareness-raising activities conducted by banking and financial institutions (revised 1997 Recommendation, Section I and V.C(i)).

12. With respect to the detection and reporting of the offence of bribing foreign public officials and related offences (recommendations 3, 5 and 6 from Phase 2), the Working Group recommends that Luxembourg:

- a) continue its awareness-raising efforts, using brochures, circulars, in-service training for public employees, or any other means, to ensure that government employees who are in a position to detect bribery, or who are in contact with Luxembourg enterprises exporting or investing abroad, will not only maintain but increase their vigilance against the bribery of foreign public officials (revised 1997 Recommendation, Section I);
- b) adopt as soon as possible the present version of the draft law on interagency and judicial cooperation that was laid before the Luxembourg Parliament in the summer of 2007, in order to enhance the means available to the Luxembourg tax authorities for detecting irregularities relating to the payment of bribes to foreign public officials (revised 1997 Recommendation, Section I);

- c) adopt measures promptly for protecting whistleblowers, in order to encourage private sector employees to report acts of transnational bribery without fear of reprisals or dismissal (revised 1997 Recommendation, Section V.C (iv)).

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

13. With respect to cooperation among administrative, financial and judicial bodies (Recommendation 9 from Phase 2), the Working Group recommends that Luxembourg:

- a) adopt promptly the provisions of the bill on interagency and judicial cooperation that will allow the tax administration, as an exception to fiscal secrecy, to transmit to the judicial authorities any evidence useful for the prosecution and punishment of foreign bribery and related offences;
- b) take all steps that could facilitate the work of the judicial authorities in seeking information from Luxembourg financial and banking institutions, including in cases where there has been no formal referral to an investigating judge.

14. With respect to the responsibility of legal persons (Recommendation 14 from Phase 2) the Working Group recommends that Luxembourg:

- a) establish promptly a clear and operational system for making legal persons liable for the bribery of foreign public officials, together with effective, proportionate and dissuasive penalties, recognizing that legislation consistent with the requirements of articles 2 and 3 of the Convention is still lacking (Convention, Articles 2 and 3)
- b) expand the scope of application of Article 5 of the Code of Criminal Procedure to give the Luxembourg courts jurisdiction over offences committed outside the territory of the Grand Duchy by legal persons of Luxembourg nationality (Convention, Articles 2 and 4).

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/55/4/32017636.pdf>

Complete Phase 2 Report bis available at:

<http://www.oecd.org/dataoecd/4/21/40322335.pdf>

Report on progress since May 2004:

<http://www.oecd.org/dataoecd/22/27/37308306.pdf>

Mexico (September 2004)

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Mexico. The Working Group further intends to follow up on certain issues.

I. Recommendations

Recommendations for Ensuring Effective Measures for Preventing Transnational Bribery

1. With respect to awareness raising, the Working Group recommends that Mexico:
 - a) In addition to the broad awareness raising campaign on corruption in general, undertake targeted actions to raise the level of awareness of the transnational bribery offence and the Convention, focusing on the obligations of Mexican companies that invest and export abroad; (Revised Recommendation, Article I)
 - b) Further develop targeted programmes for the agencies and other governmental bodies most likely to come into contact with companies engaging in business abroad, such as Bancomext and Mexican embassies and strongly encourage such institutions to play a more active role in raising awareness among Mexican companies about the Convention. In this respect, the Working Group acknowledges the initiatives of the Ministry of Foreign Affairs, following the on-site visit, aiming to raise awareness of Mexican embassies and encourages Mexico to pursue its efforts; (Revised Recommendation, Article I)
 - c) Enhance awareness of the transnational bribery offence by ensuring that federal policies and initiatives are channelled to lower levels of the administration, States and municipalities; (Revised Recommendation, Article I) and
 - d) Encourage the accounting, auditing and legal professions to develop a core of specific courses and training to raise the level of awareness and knowledge on the offence of bribery committed by Mexican individuals and companies abroad, and of Mexican multinational companies in particular, in view of their increasing role in international business transactions. (Convention, Article 8; Revised Recommendation, Article I)
2. With respect to other preventive measures, the Working Group recommends that Mexico develop specific tools for the prevention of bribery of foreign public officials directed at Mexican companies exporting and investing abroad, and in particular:
 - a) Further develop its partnership with business with the aim of identifying and disseminating “best practices” concerning anti-corruption policies to better prevent transnational bribery; (Revised Recommendation, Article I)
 - b) Consider establishing a list of companies having been involved in bribery, including companies involved in transnational bribery and circulating such list to all federal agencies in order to inform them of the potential risk of dealing with these companies, as well as for the possible application of additional non-criminal sanctions, as recommended in recommendation 6, d) (Revised Recommendation Article VI)

- c) Encourage Bancomext to require details on agents' commissions when providing support, in view of the fact that such commissions are commonly used to disguise bribes to foreign public officials; (Revised Recommendation, Article II v) and
- d) Undertake strategic analysis on the characteristics of the offence of money laundering in order to assess areas for possible improvement in its prevention and detection. (Revised Recommendation, Article I)

Recommendations for Ensuring Adequate Mechanisms for the Effective Detection, Prosecution and Sanctioning of Transnational Bribery Offences

3. With respect to the reporting of transnational bribery to the appropriate authorities, the Working Group recommends that Mexico:

- a) Ensure that all public officials are made aware of and comply with their duty to report transnational bribery offences pursuant to article 117 of the Federal Criminal Procedure Code (FCPC), and consider introducing specific sanctions for breaching the obligation under article 117 FCPC; (Convention, Article 3, Revised Recommendation, Article I)
- b) Ensure that the duty to report offences pursuant to article 116 of the FCPC (obliging citizens to report any crime to the authorities) extends to accountants and auditors, and ensure that professional rules on confidentiality do not contradict the FCPC;¹³ (Convention, Article 8; Revised Recommendation, Article I)
- c) Facilitate the reporting of transnational bribery cases and provide reporting channels equivalent to those available for domestic bribery; (Revised Recommendation, Article I) and
- d) Welcoming the consensus existing between the business sector, public officials and civil society, consider the adoption of general whistleblower protection sufficient to protect employees from dismissal or other forms of retaliation in respect of the reporting of foreign bribery. (Convention, Article 5; Revised Recommendation, Article I)

4. With respect to other measures to improve detection, the Working Group recommends that Mexico:

- a) Ensure that adequate resources be devoted to investigation and prosecution of bribery of foreign public officials, and consider the setting up of a specialised unit dealing with bribery of foreign public officials; (Revised Recommendation, Article I)
- b) Ensure that the police and prosecutors become more proactive, in particular by relying on different detection tools in addition to reports by complainants, continue to improve their training, and develop analytical tools and financial investigation techniques; (Revised Recommendation, Article I) and
- c) Accelerate and streamline the processing of suspicious transaction reports in respect of suspected money laundering. (Convention, Article 7; Revised Recommendation, Article I)

5. With respect to investigation, prosecution and sanctioning, the Working Group recommends that Mexico:

¹³ The Working Group notes that this is a general issue in many Parties.

- a) Provide internal guidelines for the use of the police and prosecutors – and encourage the judiciary to issue interpretative criteria – that highlight the differences between the offences of bribery of Mexican public officials and bribery of foreign public officials; (Revised Recommendation, Article I)
- b) Amend article 222 bis of the Federal Penal Code in order to ensure that third party beneficiaries are covered and that the definition of foreign public officials is in line with the autonomous definition of the OECD Convention;¹⁴ (Convention, Article 1)
- c) In order to meet the standard of other Parties to the Convention, revise the current provisions on legal persons to:
 - eliminate the prerequisite of the conviction of a natural person,
 - eliminate the prerequisite that the offence must be committed by means provided by the legal entity “for such purpose”, and
 - ensure that State-owned and State-controlled entities are subject to liability under the transnational bribery offence,
 - increase significantly the level of sanctions; (Convention, Articles 2 and 3; Phase 1 Evaluation).
- d) Consider the introduction of additional sanctions on legal persons, such as the temporary or permanent disqualification from participation in public procurement and public works, and a general exclusion from entitlement to public benefits or aid; (Convention, Article 3; Phase 1 Evaluation, paragraph 3)
- e) Pursue its efforts to introduce witness protection for investigations of transnational bribery within the framework of judicial reform; (Revised Recommendation, Article I)
- f) Review the current system of access to bank information with a view to ensuring prompt and effective access; (Convention, Articles 5, 9; Revised Recommendation, Article VII) and
- g) Reconsider the current practice providing mutual legal assistance based on reciprocity in the absence of bilateral agreements, in order to ensure that such practice is consistent with article 9 of the Convention. (Convention, Article 9; Revised Recommendation, Article VII)

II. Follow-up by the Working Group

6. In light of the small number and nature of cases of bribery at the federal level and the absence of case law concerning bribery of foreign public officials, it is not possible to clearly assess how the Mexican legislation will be applied in practice. The Working Group will therefore revisit the case law in a general way as it develops. This concerns in particular:

- a) The application of the offence to bribes given directly or through the foreign public official to third party beneficiaries and the interpretation of the term “foreign public official”; (Convention, Article 1; Phase 1 Evaluation, paragraph 2) and

¹⁴ The Working Group acknowledges that the bill submitted to the Parliament during the Spring session satisfactorily addresses these issues.

- b) The application of sanctions with a view to determining whether they are effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, particularly: the basis on which intangible bribes are quantified in respect of natural persons, and the practical application of fines both to natural and legal persons. (Convention, Article 3; Phase 1 Evaluation, paragraphs 3, 4)

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/53/31/33746033.pdf>

Report on progress since September 2004:

<http://www.oecd.org/dataoecd/39/39/38376307.pdf>

Netherlands (June 2006)

Based on the findings of the Working Group regarding the application of the Convention and the revised Recommendation by the Netherlands, the Working Group (1) makes the following recommendations to the Netherlands, and (2) will follow-up certain issues when there has been sufficient practice.

I. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention related activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that the Netherlands:
 - a) integrate additional training, information and awareness-raising activities about combating foreign bribery in relevant anti-corruption initiatives of the Dutch government (Revised Recommendation, Paragraph I);
 - b) encourage the accounting and auditing professions to develop initiatives to raise awareness of the foreign bribery offence and the accounting and auditing requirements under the Convention, and encourage both professions to develop specific training on foreign bribery in the framework of their professional education and training programmes (Revised Recommendation, Paragraph I).
2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands:
 - a) clarify the obligations of public servants to report suspicions of crimes, including foreign bribery, to Dutch law enforcement or prosecution authorities and raise awareness among public servants about their obligations, and the mechanisms and reporting channels available to fulfil these obligations (Revised Recommendation, Paragraph I);
 - b) implement guidelines for the personnel of diplomatic missions, export credit agencies, and other institutions who are in a position to have privileged contacts with Dutch enterprises active abroad on specific measures to be taken if suspicions of foreign bribery should arise. Guidelines should include specific reporting channels and a reminder of the applicable obligations to report serious offences (Revised Recommendation, Paragraph I);
 - c) following the enactment of the new legislation prohibiting the tax deductibility of bribes in April 2006, develop clear guidelines and provide training for tax officials as a matter of priority in order to maximise the detection of potential criminal conduct relating to foreign bribery, and to promote the reporting of suspicions to law enforcement or prosecution authorities (Revised Recommendation, Paragraph I, II);
 - d) continue to take appropriate steps to improve the flow of information and feedback between the relevant actors in the anti-money laundering system (Revised Recommendation, Paragraph I);

- e) review, in the light of recent amendments to the Reporting Act and Identification Act, whether accountants in the Netherlands have adopted a restrictive application of their obligation to report STRs under the Unusual Disclosures Act, and assess whether further measures are required to ensure that accountants (and all reporting entities) in the Netherlands report unusual or suspicious transactions to the FIU Netherlands/MOT-BLOM in accordance with the Unusual Disclosures Act (Convention, Article 5; Revised Recommendation, Paragraph I).

Recommendations for Ensuring Effective Investigation, Prosecution and Sanctioning of Foreign Bribery and related Offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands:

- a) investigate proactively foreign bribery allegations and monitor and evaluate on an on-going basis the performance of law enforcement authorities, including the *Rijksrecherche*, the National Public Prosecutor for Corruption (NPPC), and other relevant agencies, with regard to the initiation and conduct of investigations, as well as concerning decisions whether or not to prosecute foreign bribery cases (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- b) clarify the competence of the *Rijksrecherche* and of the NPPC over foreign bribery cases, as well as ensure that other law enforcement agencies are aware of the coordinating role of the NPPC in this regard, and accordingly duly report all cases of foreign bribery to the NPPC (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- c) ensure that sufficient training and resources, including specialised expertise, are made available to law enforcement authorities, including the Police, the *Rijksrecherche* and the NPPC for the effective detection, investigation and prosecution of foreign bribery offences (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- d) encourage law enforcement authorities to make full use of the broad range of investigative measures available to Dutch investigative authorities to effectively investigate suspicions of foreign bribery (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- e) encourage Dutch authorities to request MLA to obtain and assess evidence available abroad of allegations of foreign bribery over which the Netherlands has jurisdiction, and ensure that this is reflected in the 2002 *Directive on Investigation and Prosecution of Corruption of Officials* (or subsequent Directives) and is underpinned by renewed efforts to raise awareness and, where necessary, training of police and prosecutors in relation to the need to obtain MLA (Convention, Articles 5, 9; Commentary 27; Revised Recommendation, Paragraph I, II);
- f) review and amend the 2002 *Directive on Investigation and Prosecution of Corruption of Officials*, issued by the Dutch Board of Procurators General, to ensure that the information contained therein may not be interpreted contrary to the Convention and the bribery offences in the Dutch Penal Code (Convention, Article 5; Commentary 7; Commentary 27; Revised Recommendation, Paragraph I, II).

4. With respect to the offence of foreign bribery, in order to prevent misinterpretations of the offence that are contrary to the Convention, the Working Group recommends that the Netherlands take appropriate measures to further clarify the application of the law in relation to small facilitation payments and the information in the 2002 *Directive on Investigation and Prosecution of Corruption of Officials*. (Convention, Articles 1, 5; Commentary 9).

5. With respect to adjudication by courts and sanctions for foreign bribery, the Working Group recommends that the Netherlands:

- a) increase the maximum levels of monetary sanctions for legal persons, and compile statistical information on fines imposed by the courts to allow for adequate assessment of whether sanctions are proportionate, dissuasive and effective in practice (Convention, Article 3.1);
- b) ensure that judges are trained to deal with foreign bribery offences, and draw their attention to the importance of applying sanctions that are sufficiently effective, proportionate and dissuasive for foreign bribery offences (Convention, Article 3.1; Revised Recommendation, Paragraph I).

6. With respect to the related money laundering offence, the Working Group recommends that the Netherlands continue to compile statistics on the offence, including the level of sanctions and the confiscation of the proceeds of crime (Convention Article 7).

7. Given the economic role of the Netherlands Antilles and Aruba, the Working Group strongly recommends that the Netherlands in Europe continue to encourage Aruba and the Netherlands Antilles to adopt the necessary legislation in line with the principles of the Convention and Revised Recommendation, and assist them in their efforts, within the rules governing their relationship, and report to the Working Group on these processes on an ongoing basis (Convention Article 1).

II. Follow-up by the Working Group

8. The Working Group will follow up on the issues below, as practice develops in order to assess:

- a) given the recent entry into force of the new law prohibiting the tax deductibility of bribes to foreign public officials, whether its application in practice allows for the effective implementation of the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (Revised Recommendation, Paragraph I, II and IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials);
- b) whether the Netherlands can effectively rely on its territorial or nationality jurisdiction to prosecute foreign bribery offences, notably (1) where a Dutch legal person uses a non-Dutch national to bribe a foreign public official while outside the Netherlands¹⁵; (2) where the bribing of the foreign public official occurs in a third country where there is no foreign bribery offence; and (3) where the foreign bribery offence is committed by a company incorporated in the Netherlands Antilles or Aruba (Convention Articles 2 and 4; Commentary 25, 26);
- c) recent amendments that allow for greater flexibility to suspend the statute of limitations, to confirm whether the statute of limitations in the Netherlands allows for an adequate period of time for the investigation and prosecution of foreign bribery cases (Convention Article 6);
- d) the prosecution of legal persons for foreign bribery cases, to review how the jurisprudence developed by the *Hoge Raad* broadening possibilities to trigger liability of legal persons is applied by the courts in practice, and to evaluate whether this allows for the effective prosecution of legal persons (Convention Article 5; Commentary 27, Revised Recommendation, Paragraph I, II);
- e) the new provisions governing special confiscation introduced by the Act of Parliament of 8 May 2003, to ensure that full use is made of these measures in the enforcement of foreign bribery

¹⁵ The Working Group notes that this is a general issue for many Parties.

legislation, particularly in view of the low level of criminal sanctions for legal persons for foreign bribery in the Netherlands. To allow for this assessment, the Netherlands could usefully compile statistical information illustrating the use of confiscation measures by the prosecution and the courts (Convention, Article 3);

- f) the use of out-of-court transactions for foreign bribery offences, as governed by article 74 of the Dutch Penal Code, to ensure that they result in the imposition of effective, proportionate and dissuasive sanctions (Convention, Article 3.1);
- g) the application in practice of false accounting offences. To this end, the Netherlands could usefully provide information on the number of prosecutions and sanctions imposed under article 1.4 of the Economic Offences Act for contravention of article 361, et seq. of Book 2 of the Civil Code; article 225 of the Penal Code; and article 336 of the Penal Code (Convention, Article 8, Revised Recommendation, Paragraph V).

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Report on progress since June 2006

<http://oecd.org/dataoecd/61/59/41919004.pdf>

New Zealand (October 2006)

Based on its findings regarding New Zealand's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to New Zealand under Part I; and (2) will follow up the issues in Part II when there is sufficient relevant practice.

I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and Revised Recommendation, the Working Group recommends that New Zealand:

- a) increase efforts to raise awareness of the foreign bribery offence, and in particular its extraterritorial application, among public sector employees and agencies involved with New Zealand enterprises operating abroad, including foreign diplomatic representations and trade promotion, export credit, and development aid agencies (Revised Recommendation, Paragraph I);
- b) take necessary action, in cooperation with business organisations and other civil society stakeholders, to improve awareness of the foreign bribery legislation among companies, and in particular small and medium size enterprises, and advise and assist companies with regard to the prevention and reporting of foreign bribery (Revised Recommendation, Paragraph I);
- c) work proactively with the accounting and auditing profession and financial institutions to develop training for and awareness of the foreign bribery offence and its status as a predicate offence for money laundering (Revised Recommendation, Paragraph I).

2. With respect to the detection and reporting of foreign bribery and related offences, the Working Group recommends that New Zealand:

- a) establish procedures to be followed by public sector employees, including employees of the Ministry of Foreign Affairs and Trade, and of export credit, trade promotion and development aid agencies, to report to law enforcement authorities credible information about foreign bribery that they may uncover in the course of their work, and encourage and facilitate such reporting (Revised Recommendation, Paragraph I);
- b) amend the New Zealand tax legislation to require, where appropriate, Inland Revenue to provide information on request from law enforcement authorities in the context of foreign bribery investigations, and to report information regarding suspected foreign bribery uncovered in the course of their work to law enforcement authorities (Revised Recommendation, Paragraph I); and
- c) require external auditors to report all suspicions of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies regardless of whether the suspected bribery would have a material impact on the financial statements; and

consider requiring external auditors, in the face of inaction after appropriate disclosure within the company, to report such suspicions to the competent law enforcement authorities (Revised Recommendation, Paragraph V.B).

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

3. With respect to the investigation and prosecution of foreign bribery offences, the Working Group recommends that New Zealand:

- a) take necessary measures to ensure that all credible foreign bribery allegations are properly investigated (Convention, Article 5; Revised Recommendation, Paragraph I);
- b) ensure that the Serious Fraud Office (SFO) receives all allegations of foreign bribery offences (Convention, Article 5; Revised Recommendation, Paragraph I);
- c) make effective investigative means available in foreign bribery investigations; provide a framework for access to information stored on computers; and ensure that sufficient training and resources are made available to law enforcement authorities, including the SFO, New Zealand Police and Crown solicitors, for the effective investigation and prosecution of foreign bribery offences (Convention, Article 5; Revised Recommendation, Paragraph I);
- d) take appropriate action to ensure, in foreign bribery cases, that New Zealand is able to provide mutual legal assistance to foreign authorities regardless of whether law enforcement agencies would have territorial jurisdiction to open their own investigations (Convention Article 9(1); Revised Recommendation, Paragraph I);
- e) ensure that, where a request for extradition of a person for suspected foreign bribery is prohibited or is refused solely on the ground that the person is a New Zealand national, the case is submitted to the competent New Zealand authorities for purposes of prosecution; actively pursue its efforts to facilitate where appropriate the procedures for extradition, in particular to countries with different legal systems; and reconsider the requirement, currently applicable to certain Working Group Member States, of Ministerial approval of requests for extradition under the Convention (Convention Articles 10(2) and 10(3); Revised Recommendation, Paragraph I); and
- f) take all necessary measures to ensure that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved do not influence the investigation or prosecution of foreign bribery cases, and, in this respect, amend the Solicitor-General's Prosecution Guidelines and remove the requirement for the Attorney-General's consent for foreign bribery (Convention, Article 5; Revised Recommendation, Paragraph I).

4. With respect to the offence of foreign bribery and the liability of legal persons for foreign bribery, the Working Group recommends that New Zealand:

- a) broaden the criteria for the criminal liability of legal persons for foreign bribery (Convention, Article 2);
- b) remove or amend the double criminality exception in section 105E of the Crimes Act 1961 in order to achieve full compliance with the Convention (Convention, Article 1); and

- c) clarify the routine government action (facilitation payments) exception in section 105C(3) of the Crimes Act 1961 to ensure that the foreign bribery offence can apply to any bribery of a foreign public official in the conduct of international business in order to obtain (1) discretionary or illegal acts by the official; or (2) the granting of any improper advantage, including advantages such as tax breaks that may be unrelated to the specific terms of business (Convention, Article 1).

5. With respect to related tax and money laundering offences, the Working Group recommends that New Zealand:

- a) amend its legislation to ensure that no foreign bribe payments covered under criminal law are tax deductible, including in particular bribes (i) paid through intermediaries; (ii) paid for the purpose of obtaining an advantage for a third party; (iii) paid to foreign public officials for acts or omissions in relation to the performance of official duties, and (iv) “promised” or “offered” as well as paid (Revised Recommendation, Paragraph IV); and
- b) amend the double criminality exception for the money laundering offence in section 245 of the Crimes Act 1961, in order to ensure that foreign bribery is always a predicate offence for money laundering, without regard to the place where the bribery occurred (Convention, Article 7).

6. With respect to sanctions for foreign bribery offences, the Working Group recommends that New Zealand:

- a) ensure that legal persons convicted of foreign bribery are subject to effective, proportionate and dissuasive sanctions (Convention, Article 3);
- b) consider permitting the imposition of both fines and imprisonment for foreign bribery offences (Convention, Article 3); and
- c) proceed with the adoption of proposed proceeds of crime legislation aimed at facilitating confiscation where appropriate, including in foreign bribery cases, and draw the attention of investigating, prosecutorial and judicial authorities to the importance of confiscation as a sanction for foreign bribery (Convention, Article 3(3)).

II. Follow-Up by the Working Group

7. The Working Group will follow-up on the issues below, as practice develops, in order to assess:

- a) the performance of law enforcement authorities with regard to foreign bribery allegations, including in particular with regard to decisions not to open or to discontinue investigations;
- b) the level of sanctions, including confiscation, applied in foreign bribery cases and in particular with regard to legal persons;
- c) jurisdiction over legal persons;
- d) the intent requirements in the foreign bribery statute;
- e) the application of the tax deduction for facilitation payments; and
- f) enforcement of the accounting fraud offences.

Complete Phase 2 Report available at:
<http://www.oecd.org/dataoecd/57/38/37658136.pdf>

Report on progress since October 2006
<http://oecd.org/dataoecd/7/57/42486288.pdf>

Norway (April 2004)

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Norway, the Working Group (i) makes the recommendations to Norway under part 1, and (ii) will follow-up the issues in part 2 when there has been sufficient practice in Norway in respect of cases involving the bribery of foreign public officials.

I. Recommendations

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

1. With respect to awareness raising, the Working Group recommends that Norway:
 - a) Pursue existing efforts undertaken to raise awareness of the offence of bribery in international business transactions, in particular where small and medium size enterprises are concerned (Revised Recommendation, Article I);
 - b) Communicate to the business sector that, under the new legislation, facilitation payments are not allowed (Revised Recommendation, Article I);
 - c) Undertake further actions through institutions which are in a position to have privileged contacts with Norwegian enterprises exporting abroad, such as GIEK (the Norwegian export credit agency) or the Ministry of Foreign Affairs, notably through its diplomatic missions abroad (Revised Recommendation, Article I);
 - d) Consider, in this context, establishing a coordinating body to oversee awareness raising activities undertaken by Norwegian public authorities and relating to bribery of foreign public officials (Revised Recommendation, Article I).
2. With respect to detection, the Working Group recommends that Norway:
 - a) Pursue its efforts to develop further cooperation between the public institutions which could usefully contribute to the detection of the offence of bribery of foreign public officials and the law enforcement authorities (Revised Recommendation, Article I);
 - b) Consider the introduction of a general obligation for staff of public institutions to report suspicions of corruption by Norwegian companies to the competent authorities (Revised Recommendation, Article I);
 - c) Bearing in mind the vital role of auditors in uncovering and reporting bribery offences, raise awareness concerning the obligation for auditors to report any suspect **activity** that would indicate an unlawful act of bribery to law enforcement authorities (Convention, Article 8; Revised Recommendation, Article V.B.iv);

- d) Continue ongoing reflection undertaken by several public bodies in Norway on the issue of whistleblower protection, with a view to introducing measures to ensure adequate protection against sanctions to employees who report suspected cases of bribery of foreign public officials (Revised Recommendation, Article I).

Recommendations for ensuring effective prosecution and sanctioning of bribery of foreign public officials

- 3. With respect to prosecution, the Working Group recommends that Norway:
 - a) Ensure that sufficient financial and human resources continue to be allocated to Økokrim and economic sections of police districts in order to retain full ability to carry out international investigations in cases of transnational bribery (Convention, Article 5; Revised Recommendation, Article I; Annex to the Revised Recommendation, Paragraph 6);
 - b) Given the recently introduced distinction between basic and aggravated bribery, ensure that law enforcement authorities are fully aware of the range of investigative tools available, and have sufficient expertise to make broad use of these, where appropriate; and consider extending the availability of witness protection programmes to foreign bribery cases (Revised Recommendation, Article I);
 - c) Draw attention of the law enforcement and judicial authorities to the importance of making full use of the various economic sanctions available on the bribers, taking into account the particular circumstances surrounding cases of transnational bribery (Convention Article 3).

II. Follow-up by the Working Group

- 4. In light of the recent amendment to the offence of domestic and transnational bribery introduced in Norwegian law, and in the absence of definitive case law concerning bribery of foreign public officials, the Working Group will follow up:
 - a) The application of the new offence in practice as litigation of the bribery offence develops, in particular the notion of impropriety of the advantage (Convention, Article 1.1);
 - b) The criminal liability of legal persons, to ascertain that the bribery offence is effectively applied to legal persons, either through court decisions or optional fines and confiscation (Convention, Articles 2 and 4);
 - c) The consequences of the distinction between basic and aggravated bribery in terms of the length of the limitation period, and in terms of whether different modalities of interruption adequately suspend the operation of the statute of limitation, especially where legal persons are involved (Convention, Articles 1.1, 6);
 - d) The application of sanctions, notably the practice with regard to confiscation of both the instruments and the proceeds, in order to determine whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of active bribery of foreign public officials (Convention, Article 3).

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<http://www.oecd.org/dataoecd/3/28/31568595.pdf>

Report on progress since April 2004:

<http://www.oecd.org/dataoecd/35/26/38284036.pdf>

Poland (January 2007)

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Poland, the Working Group (1) makes the following recommendations to Poland, and (2) will follow-up certain issues when there has been sufficient practice.

I. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of the bribery of foreign public officials

1. With respect to awareness raising and training activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that Poland:

- a) provide training to police, prosecutors and the judiciary on the Convention and on Poland's foreign bribery legislation (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs 1, II);
- b) take additional measures, including further training, to raise the level of awareness of the Convention and the foreign bribery offence within the public administration, particularly those institutions that interact with Polish companies active in foreign markets, including foreign diplomatic representations, and trade promotion, official export credit support and Official Development Assistance (ODA) institutions, (Revised Recommendation, Paragraph I);
- c) take necessary action to improve awareness of the Convention and of foreign bribery legislation among business associations and companies, including small and medium size enterprises, and among Non-Government Organisations and companies involved in the execution of ODA contracts funded by Poland (Revised Recommendation, Paragraph I);
- d) encourage the accounting and auditing professions to develop further initiatives to (i) provide training and raise awareness concerning the foreign bribery offence and the relevant accounting and auditing requirements under Polish law; and (ii) publicise within both professions the obligation to report suspicions of foreign bribery to the appropriate bodies. (Revised Recommendation, Paragraphs I and V);
- e) take further measures to raise awareness about the Law on Liability of Collective Entities to ensure that possible contraventions of the law by legal persons are actively investigated and prosecuted and, to that extent, consider (1) measures to assist police and prosecutors with the investigation and prosecution of legal persons pursuant to the Law; and (2) the provision of further training for police and prosecutors about the operation of the Law (Revised Recommendation, Paragraphs I).

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Poland:

- a) adopt measures to ensure that Polish public officials who could play a role in the detection and prevention of the foreign bribery offence are aware of their duty to report foreign bribery to law enforcement authorities in Poland, and the procedures and channels for such reporting (Revised Recommendation, Paragraph I);
- b) with respect to personnel in charge of Official Development Assistance, and those in other institutions that have privileged contacts with Polish enterprises active abroad, provide training on how to detect foreign bribery and on specific measures to be taken if credible suspicions of foreign bribery should arise, including reporting channels and arrangements for co-operation and co-ordination between the relevant government ministries (Revised Recommendation, Paragraph I);
- c) provide training for tax officials as a matter of priority in order to maximise the possibility of detection of the bribery of foreign public officials, including information about the non-tax deductibility of bribes to foreign public officials under the Convention and the obligation of tax officials to report suspicions of such bribes to law enforcement authorities (Revised Recommendation, Paragraphs I, II; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials);
- d) consider introducing stronger whistleblower protection measures for public and private sector employees who report suspicious facts that may indicate foreign bribery, in order to encourage them to report such facts without fear of reprisals (Convention, Article 5; Revised Recommendation, Paragraphs I and V.C(iv));
- e) consider strengthening the measures for deterring foreign bribery in respect of international business transactions benefiting from official export credit support, including through the assessment of applications for officially supported export credits and the scrutiny of agents' commissions (Revised Recommendation, Paragraph II (v));
- f) encourage the General Inspector of Financial Information to consider taking appropriate and practicable steps to improve the flow of information and feedback to obligated institutions on the use of suspicious transaction reports by the authorities, with the view to further strengthening the anti-money laundering reporting system (Revised Recommendation, Paragraph I);
- g) consider requiring auditors to report indications of a possible illegal act of foreign bribery to law enforcement authorities (Revised Recommendation, Paragraphs I and V.B(iv)).

Recommendations for Ensuring Effective Investigation, Prosecution and Sanctioning of Foreign Bribery and related Offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Poland:

- a) take necessary measures to ensure that all credible foreign bribery allegations are proactively and conscientiously investigated, and remind police and prosecutors of the importance of actively looking into the range of possible sources of detection of foreign bribery (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- b) ensure that greater use is made of specialised financial investigators within anti-corruption units of the police and State Prosecution Authority for the effective detection, investigation and prosecution of foreign bribery offences (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);

- c) in relation to the dual nature of the Office of the Prosecutor General (*i.e.*, the Office is held by the Minister of Justice) consider strengthening safeguards to ensure that the exercise of investigative and prosecutorial powers (in particular for the foreign bribery offence) are not to be influenced by considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I);
 - d) consider, within Poland's constitutional principles, measures that may be taken in order to ensure that the immunity from prosecution available to certain designated office holders does not impede the effective investigation, prosecution and adjudication of foreign bribery cases and related offences and, in this respect, consider clearly limiting the immunity applicable to them, to acts done in performance of the office holder's duties (*i.e.* functional immunity) (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);
 - e) review the "impunity" provision within article 229.6 of the Penal Code and either exclude its application to the offence of foreign bribery, or significantly limit its scope by imposing further conditions for its application, or in some other appropriate way ensure that the law does not contravene the Convention and report to the Working Group on progress in 12 months (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II);
 - f) amend the Law on Liability of Collective Entities to eliminate the requirement that a natural person be finally and validly convicted as a prerequisite to proceeding against a collective entity (Convention, Articles 2, 3.2).
4. With respect to sanctions for foreign bribery, the Working Group recommends that Poland:
- a) take measures to draw to the attention of investigating, prosecutorial and judicial authorities, the importance of applying sanctions that are sufficiently effective, proportionate and dissuasive for foreign bribery offences, in particular emphasising the importance of economic sanctions, including fines and the forfeiture of proceeds of bribery, and offer training in tracking down the proceeds of bribery and assessing the value of such proceeds (Convention, Article 3.1; Revised Recommendation, Paragraph I);
 - b) consider whether the cap on fines for legal persons under the Law on Liability of Collective Entities (*i.e.*, 10% of the "revenue" generated in the tax year when the offence was committed) is an obstacle to imposing effective, proportionate and dissuasive sanctions, and if so, amend the Law accordingly (Convention, Article 3.2).
5. With respect to the non-tax deductibility of bribes, the Working Group recommends that Poland amend its legislation to clearly confirm that bribes are not tax-deductible and in that regard, consider an express prohibition on the tax deductibility of bribes. (Revised Recommendation, Paragraph IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials).

II. Follow-up by the Working Group

6. The Working Group will follow up on the issues below, as practice develops, in order to assess:
- a) the application of the foreign bribery offence in the Penal Code, including its coverage of bribes made to third parties and to all aspects of the term "foreign public official";

- b) the application, in article 3 of the Law on Liability of Collective Entities, of the requirement that the conduct of the natural person did or could have given the collective entity an advantage, to ascertain how this provision is applied in practice to foreign bribery cases;
- c) the level of sanctions for the foreign bribery offence and related offences (including false accounting offences) imposed against natural and legal persons (including the application of confiscation measures, additional sanctions and the use of suspended imprisonment terms by courts) and to ascertain whether the sanctions handed down by the courts are effective, proportionate and dissuasive;
- d) Poland's application of territorial and nationality jurisdiction, in particular, in cases of proceedings against legal persons or concerning offences committed in whole or in part abroad;
- e) whether the Central Anti-Corruption Bureau (CBA) established in 2006 has developed a role and capacity for combating foreign bribery in international business transactions and, if so, the effectiveness of any arrangements established to co-ordinate its work with the police and the State Prosecution Authority in investigating foreign bribery cases;
- f) whether the exception for "service type work" in the Penal Code definitions of "public official" and "a person performing public functions" does not, contrary to Article 1 of the Convention, result in an exception to the foreign bribery offence for acts or omissions of a foreign public official "in relation to the performance of official duties" (Convention, Articles 1, 5; Commentary 9).

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Portugal (March 2007)

Based on the findings of the Working Group with respect to Portugal's implementation of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Portugal. In addition, the Working Group recommends that certain issues should be re-examined as the case law and practice evolve.

I. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of the Bribery of Foreign Public Officials

1. With respect to awareness raising and prevention-related activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that Portugal:
 - a) take necessary measures – in association with business and civil society organisations– to raise awareness among the private sector regarding the Convention, the offence of foreign public officials and the liability of legal persons, as well as applicable jurisdictional rules, and promote and assist in the implementation of preventive organisational measures and ethical standards within businesses present in foreign markets, including through provision of targeted assistance to SMEs (Revised Recommendation, Section I);
 - b) take necessary measures to raise the level of awareness among officials in government agencies and the judiciary that may play a role in detecting, reporting, investigating, or prosecuting the offence of bribery of foreign public officials, and among those in contact with Portuguese companies exporting or investing abroad (in particular diplomatic missions and trade promotion agencies), as well as the general public (Revised Recommendation, Section I);
 - c) take awareness raising measures specifically targeting Portuguese Institute for Development Support (IPAD) staff and its public and private sector partners about issues related to the Convention and corruption in the context of ODA projects (Revised Recommendation, Section I).
2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences, the Working Group recommends that Portugal:
 - a) make public employees who are subject to the obligation to report any offence that comes to their knowledge more aware of the importance of effectively fulfilling this obligation in suspected instances of foreign bribery (Revised Recommendation, Section I);
 - b) issue specific instructions/guidance to diplomatic, export promotion, export credit support, and ODA staff concerning the various steps that should be taken when they notice allegations that a Portuguese company or individual has bribed or taken steps to bribe a foreign public official, with a view to ensure that serious allegations eventually reach the Portuguese prosecuting authorities as appropriate (Revised Recommendation, Section I);

- c) take measures to amend the Personal Income Tax and Companies Tax Codes to disallow and forbid confidential expenses, and draw clear guidelines for the tax authorities prescribing the verifications to be undertaken with a view to detect possible offences of bribery of foreign public officials (Revised Recommendation, Section IV);
- d) ensure, in consultation with the relevant supervisory bodies, that chartered accountants and statutory auditors receive training and guidelines regarding the provisions of article 41-A of Decree Law 28/84 in connection with their obligations to report any public crime to the Public Prosecutor's Office, and that those who fail to comply with this obligation are subject to effective disciplinary measures (Convention Article 8; Revised Recommendation, Sections I, II and V);
- e) ensure that financial and other entities and professionals subject to the obligation to declare suspicious transactions to the Financial Information Unit continue to receive guidelines on the identification of transactions related to foreign bribery (Revised Recommendation, Section I);
- f) pursue its efforts to encourage companies to provide internal channels for communication by, and internal protection for, potential whistleblowers (Revised Recommendation, Section V).

Recommendations for Ensuring Effective Investigation, Prosecution and Sanctioning of Foreign Bribery and Related Offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Portugal:

- a) encourage relevant law enforcement authorities to take a more proactive approach to investigating all foreign bribery allegations and to make full use of the broad range of investigative measures available to them to effectively investigate and prosecute cases of foreign bribery (Convention, Article 5; Revised Recommendation, Sections I, II);
- b) ensure that the Central Criminal Investigation and Prosecution Department (DCIAP), pursuant to articles 46-47 of Law 60/98, takes a more active role in directing inquiries and carrying out penal actions associated with the offence of bribery of foreign public officials in international business transactions; and ensure, in this regard, that other departments of the public prosecution service promptly report all suspicions of foreign bribery to the DCIAP (Convention, Article 5; Revised Recommendation, Sections I, II);
- c) ensure that sufficient training and resources, including specialised expertise and relevant information regarding the number, profile, treatment and criminal outcomes of cases featuring bribery in international business, are made available to relevant authorities – including the judicial police and magistrates – for the effective detection, investigation and prosecution of foreign bribery (Convention, Article 5; Revised Recommendation, Sections I, II);
- d) raise awareness among the law enforcement authorities about the special applicable rules, provided in article 3 of Law 13/2001, for establishing nationality and extraterritorial jurisdiction over foreign bribery offences; notably with regard to the absence of a requirement of dual criminality (Convention, Article 4, Revised Recommendation, Section I).

4. With respect to the offence of foreign bribery, the Working Group recommends that Portugal:

- a) amend the definition of foreign political officials in order for it to fully comply with the requirements of the Convention in respect of the autonomous definition of foreign public officials (Convention, Article 1 paragraph 4; Commentaries 3 and 12 to 19).

5. With respect to the liability of legal persons, the Working Group recommends that Portugal:

- a) provide guidance to investigating and prosecutorial authorities on the criteria for triggering the liability of legal persons as applied to foreign bribery cases; this should include clarification (i) of the status of the provisions of article 3 of DL 28/84 when confronted with the new general provisions on the liability of legal persons in the Criminal Code; (ii) of the application of the criminal liability of legal persons when a bribe is given by a regular employee or an outside agent of the legal person; and (iii) of the application of the criminal liability of legal persons when there is no prosecution or conviction of a natural person for a corresponding offence (Convention, Article 2; Revised Recommendation, Section I);
- b) consider taking measures in order to prevent abuse of the legal provision laying down the absence of criminal liability of legal persons in cases where the foreign bribery act was committed by the natural perpetrator against orders from authorised persons within the legal person (Convention, Article 2; Revised Recommendation, Section I).

6. With respect to sanctions for foreign bribery, the Working Group recommends that Portugal:

- a) draw the attention of the investigating and prosecutorial authorities (e.g. through training or guidelines) to the importance of the pre-trial seizure of the proceeds of bribery for the purpose of ensuring the full use of the measure of confiscation in the enforcement of the foreign bribery legislation (Revised Recommendation, Section I; Convention, Article 3 paragraph 3);
- b) with a view to ensure the full effectiveness of accessory measures in the enforcement of foreign bribery legislation, such as the temporary deprivation of the right to bid in public tenders, set up a criminal record for convicted legal persons (Revised Recommendation, Section I; Convention, Articles 2 and 3 paragraph 4);
- c) take appropriate measures to include an anti-corruption clause in aid-funded contracts concluded with the various actors involved in the administration of ODA projects (Revised Recommendation, Sections II.v and VI.iii; Convention, Article 3 paragraph 4).

II. Issues for Follow-up by the Working Group

7. The Working Group will follow up on the issues below, as practice develops, in order to assess:

- a) whether amendments to Decree Law 28/84 or other measures are required to supplement or clarify the existing language defining the elements of foreign bribery with regard to (i) cases of bribery through intermediaries where the briber only gives generic instructions to bribe with no information to the intermediary on the exact amount and identity of the intended recipient of the bribe; (ii) cases of active bribery in the absence of the proof of a counterpart or of an agreement to such a counterpart by the passive briber; and (iii) cases of bribery in international business of EU, EU Member States, and international officials, in light of potential overlaps with paragraphs 1 and 2 of art. 18 of Law 34/87 and art. 374 CC (Convention, Article 1);
- b) the application of the criminal liability of legal persons where: (i) the bribery act does not directly result in profits entering the legal person (e.g. bribery to obtain tax breaks, custom clearance, etc.); (ii) a bribe is given to a foreign public official by a representative of this legal person only for the legal person's partial benefit or for the benefit of another legal person; (iii) the offence is committed wholly abroad by Portuguese legal persons, including where the natural person who committed the offence is not a Portuguese national or is not found in Portugal; and (iv) this legal person is state-owned or state-controlled (Convention, Article 2);

- c) the application of sanctions to natural and legal persons for the offence of foreign bribery with a view to determining whether the sanctions are sufficiently effective, proportionate and dissuasive to prevent and punish the offence (Convention, Article 3);
- d) future anti-bribery measures taken by COSEC, including any revision of the anti-bribery declaration in COSEC contracts and of the anti-bribery stand-alone statement submitted by exporters applying for support (Revised Recommendation, Sections I and II).

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<http://www.oecd.org/dataoecd/28/24/38320110.pdf>

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Slovak Republic (November 2005)

Based on its findings on Slovakia's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to Slovakia and (2) will follow up certain issues as cases emerge.

I. Recommendations

Recommendations Concerning Prevention, Detection and Awareness of Foreign Bribery

1. Concerning raising awareness of the Convention, the Revised Recommendation and the foreign bribery offence, the Working Group recommends that:

- a) Slovakia take further action to raise awareness in the private sector, especially among (1) the private sector and the business community, and particularly those enterprises which operate internationally, (2) the accounting, auditing and legal professions, (3) clients and potential clients of EXIMBANKA SR, and (4) companies and individuals who are involved in projects funded by official development assistance;
- b) Slovakia raise awareness of foreign bribery among public officials, particularly those of (1) EXIMBANKA SR, (2) the Ministry of Foreign Affairs involved in official development assistance, (3) the tax authority, (4) the Supreme Audit Office, and (5) foreign representations, including embassies; and
- c) the Ministry of Justice publish the manual on the Convention at the earliest possible date (Revised Recommendation I).

2. Concerning the prevention and detection of foreign bribery through taxation, the Working Group recommends that Slovakia:

- a) introduce an express denial of tax deductibility of bribe payments to foreign public officials (Revised Recommendation IV); and
- b) provide guidelines, instructions and training to tax examiners on detecting foreign bribery during tax audits (Revised Recommendation I).

3. Concerning prevention and detection of foreign bribery through export credits, the Working Group recommends that EXIMBANKA SR require a client to disclose sufficient information, such as details on agents' commissions, which would enable EXIMBANKA SR to verify whether the client has engaged in foreign bribery (Revised Recommendation I).

4. Concerning prevention and detection of foreign bribery through accounting and auditing, the Working Group recommends that Slovakia:

- a) ensure that accounting and auditing issues related to bribery are regularly examined in the context of the mandatory training requirements for auditors, including auditors of the Supreme Audit Office (Revised Recommendation I); and
- b) require external auditors to report indications of a possible illegal act of bribery to internal corporate monitoring bodies as appropriate, and consider requiring external auditors to report such indications to competent authorities (Revised Recommendations V.B.iii and V.B.iv).

5. Concerning prevention and detection of foreign bribery through anti-money laundering measures, the Working Group recommends that Slovakia provide better guidance to entities that are required to report suspicious transactions, for instance, by providing typologies on money laundering where the predicate offence is bribery (Convention, Article 7; Revised Recommendation I).

6. Concerning reporting of foreign bribery cases, the Working Group recommends that Slovakia:

- a) raise the awareness within the private sector and among public officials of the legal obligation under the Slovak Penal Code to report foreign bribery to law enforcement authorities;
- b) continue its efforts to make whistleblower protection under Section 13 of the Labour Code more widely known among companies and the general public; and
- c) maintain statistics as to the number and sources of allegations of bribery (Revised Recommendation I).

Recommendations Pertaining to Investigation of Foreign Bribery

7. Concerning investigation of foreign bribery, the Working Group recommends that:

- a) the Slovak Police Academy continue to train police officers and recruits (including those who are not members of the Bureau of the Fight against Corruption) on investigating foreign bribery, including the practical aspects of bribery investigations; and
- b) Slovakia further enhance the co-operation among law enforcement agencies that are involved in combating foreign bribery (Revised Recommendation I).

Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery and Related Offences

8. Concerning the offence of foreign bribery, the Working Group recommends that Slovakia (a) amend its legislation to exclude the defence of “effective regret” from the offence of foreign bribery, and (b) ensure the provision of immunity to co-operating offenders is not an impediment to the effective enforcement of the foreign bribery offence (Convention, Article 1).
9. Concerning prosecution of foreign bribery, the Working Group recommends that:
 - a) Slovakia ensure that the Special Court and the Office of the Special Prosecutor are effective in the fight against foreign bribery. In particular, they recommend that Slovakia ensure that these institutions are adequately staffed with prosecutors and judges; and
 - b) the Slovak Judicial Academy organise training programmes on foreign bribery for the Special Judges and Special Prosecutors, including new recruits (Revised Recommendation I).
10. Concerning the liability of legal persons for foreign bribery, the Working Group strongly recommends that Slovakia establish such liability without delay, and put in place sanctions that are effective, proportionate and dissuasive (Convention, Articles 2 and 3(2)).
11. Concerning the offence of money laundering, the Working Group recommends that Slovakia take appropriate measures to enforce its money laundering offence more effectively, particularly in connection with bribery cases (Convention, Article 7).
12. Concerning the offence of false accounting, the Working Group recommends that Slovakia:
 - a) take appropriate measures to enforce accounting and auditing offences more effectively in connection with bribery cases; and
 - b) ensure that the sanctions for false accounting in practice are effective, proportionate and dissuasive (Convention, Article 8).
13. Concerning sanctions, the Working Group recommends that Slovakia continue to compile statistics on the criminal, civil and administrative sanctions (including confiscation) for domestic and foreign bribery, money laundering and false accounting (particularly those under the Act on Accounting) (Convention, Articles 3, 7 and 8(2)).

II. Follow-up by the Working Group

14. The Working Group will follow up the issues below as cases and practice develop in Slovakia:
 - a) whether the Slovak Penal Code covers the bribery of (1) a judge or an official of an international judicial institution that is not accepted by the Slovak Republic, and (2) an official or agent of a public international organisation of which Slovakia is not a member and with which Slovakia does not have a “conventional relationship” (Convention, Article 1);
 - b) the application of the provision of immunity to co-operating offenders in foreign bribery cases (Convention, Article 1);
 - c) the application of the defence of socially acceptable gifts in foreign bribery cases (Convention, Article 1); and

- d) the application of sanctions under the legislation implementing the Convention (*i.e.* the foreign bribery, money laundering and false accounting offences) (Convention, Articles 3, 7 and 8(2); Revised Recommendation V.A(iii)).

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Slovenia (June 2007)

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Slovenia, the Working Group (1) makes the following recommendations to Slovenia, and (2) will follow-up certain issues when there has been sufficient practice.

I. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of the bribery of foreign public officials

1. With respect to prevention, awareness raising and training activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that Slovenia:

- a) ensure that measures for the prevention, detection and raising awareness of foreign bribery are included in the national anti-corruption strategy, and encourage effective coordination and implementation of these measures by the Commission for the Prevention of Corruption, or any other appropriate, independent body charged with preventing foreign bribery in the future (Revised Recommendation, Section I);
- b) take measures to raise the level of awareness of the Convention and the foreign bribery offence within the public administration, including more specialised information on foreign bribery in training programmes for police, state prosecutors, judges, the tax administration and agencies that interact with Slovenian companies active in foreign markets (diplomatic representations, and trade promotion, export credit and development aid agencies) (Revised Recommendation, Section I, II and IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials);
- c) take active measures to raise awareness among Slovenian business associations and companies, including SMEs, about the Convention, the offence of foreign public officials and the government's intention to enforce it, and the liability of legal persons; and work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and encourage these professions to develop specific training (Revised Recommendation, Sections I, II.iii and V);
- d) in relation to official export credit support, ensure that SID Bank's anti-bribery declarations and policies expressly refer to bribery of foreign public officials, and consider adherence with the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (Revised Recommendation, Section I and II).

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Slovenia:

- a) remind public officials of their obligation to report instances of bribery of foreign public officials, and issue clear instructions to be followed by employees of export credit, trade promotion and development aid agencies and diplomatic representations on how to recognise indications of

foreign bribery and on the concrete steps to take if suspicions or indications of foreign bribery should arise, including reporting the matter as appropriate to the Slovenian law enforcement authorities (Revised Recommendation, Sections I, II and VI.iii);

- b) take measures for enhancing and promoting whistleblower protection mechanisms for public and private sector employees who report suspicious facts that may indicate foreign bribery, in order to encourage them to report such facts without fear of retaliation (Convention, Article 5; Commentary 27; Revised Recommendation, Sections I and V.C.iv);
- c) introduce a clear requirement for external auditors to report all indications of possible acts of foreign bribery to company management and, as appropriate, to corporate monitoring bodies; consider requiring external auditors, in the face of inaction after appropriate disclosure within the company, to report such suspicions to the competent law enforcement authorities; and consider whether the criteria requiring certain Slovenian companies to submit to an external audit are adequate in that they ensure that all significant Slovenian companies conducting business internationally with public sector partners submit to such an audit (Revised Recommendation, Sections I, II.iii and V.B);
- d) take additional measures to encourage Slovenian businesses active in foreign markets (i) to implement adequate internal company controls and standards of conduct, with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; (ii) to develop monitoring bodies (such as audit committees) that are effective and independent from management; and (iii) to make statements in their annual reports about their internal compliance programs for the prevention and detection of foreign bribery (Revised Recommendation, Sections I, II.iii and V.C);
- e) with regard to money laundering and foreign bribery, ensure that the institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the OMLP itself, receive appropriate directives and training (including typologies) on the identification and reporting of information that could be linked to active bribery of foreign public officials (Convention, Article 7; Revised Recommendation, Sections I and II.iv).

Recommendations for Ensuring Effective Investigation, Prosecution and Sanctioning of Foreign Bribery and related Offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Slovenia:

- a) take further steps to ensure that police investigations of the foreign bribery offence cannot be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved (Convention, Article 5; Commentary 27; Revised Recommendation, Section I);
- b) introduce the necessary legislative measures in order to clarify the roles and duties of the police, prosecutors and investigative judges in the conduct of criminal investigations; require prosecutors to more actively initiate, direct and supervise criminal investigations; simplify and streamline the process for obtaining the grant of a judicial investigation and reduce, to the extent possible, the duplication of effort and procedures between the pre-trial and trial phase (Revised Recommendation, Section I; Annex to the Revised Recommendation, Paragraph 6);
- c) ensure that the evidential burden placed on law enforcement authorities for the grant of a judicial investigation is not excessive; and with regard to court delays, determine whether increased

resources are required or if there are any legal obstacles that could be remedied, without removing important institutional guarantees that ensure the independence of the judiciary (Convention, Articles 5 and 6; Commentary 27; Revised Recommendation, Section I; Annex to the Revised Recommendation, Paragraph 6);

- d) ensure that sufficient resources and specialist financial and accounting expertise are provided to police and prosecutors and ensure that they are used at an early stage in the pre-trial procedure in order to enable them to more effectively detect, investigate and prosecute complex economic crimes cases, including foreign bribery offences; seriously consider extending the maximum time limits for the authorised use of special investigative techniques in criminal investigations; and adapt the existing processes for handling MLA requests to ensure that police or state prosecutors are able to scrutinise incoming MLA requests so as to assess and determine whether a separate investigation should be initiated in Slovenia (Convention, Articles 5 and 6; Commentary 27; Revised Recommendation, Section I and VII; Annex to the Revised Recommendation, Paragraph 6);
- e) take measures, within the constitutional principles of the state, in order to ensure that immunity from criminal proceedings available to certain designated office holders does not impede the effective investigation, prosecution and adjudication of foreign bribery cases and related offences. These measures could include the adoption of guidelines establishing clear criteria for lifting the immunity of office holders, especially in relation to non-professional immunity (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraphs I, II).

4. With respect to the offence of foreign bribery, the Working Group recommends that Slovenia:

- a) ensure that all bribes to a foreign public official to obtain any use of the official's position – whether or not within the official's authorised competence and whether or not for the purpose of obtaining an “official” act – constitute the basis for a foreign bribery offence (Convention, Article 1);
- b) ensure that bribery through an intermediary constitutes the basis for a foreign bribery offence (Convention, Article 1);
- c) ensure that a reference to foreign law is not needed for defining the foreign public official’s duty to exercise judgement or discretion impartially, and accordingly – for the purpose of the foreign bribery offence – consider abolishing the distinction between bribery for obtaining a “proper” and an “improper” act/omission by the foreign public official, as this distinction depends on the definition of the foreign public official’s duty and level of discretion as provided under foreign law, and on the strength of the impartiality requirements and safeguards defined therein (Convention, Articles 1 and 3; Commentary 3).

5. With respect to the liability of legal persons, the Working Group recommends that Slovenia, in relation to the Liability of Legal Persons for Criminal Offences Act:

- a) take further steps to raise awareness of police and prosecutors (*e.g.* through guidelines and training) about the Act to ensure that possible contraventions of the law by legal persons are actively investigated and prosecuted (Convention, Article 2; Revised Recommendation, Section I; Annex to the Revised Recommendation, Paragraph 6);
- b) undertake a review of the Act to ensure that the elements required to prove a link between the natural person that perpetrated the crime and the liability of the legal person under the Act are not

obstacles to effective enforcement of the Act (Convention, Articles 2 and 3; Revised Recommendation, Section I).

6. With respect to sanctions for foreign bribery, the Working Group recommends that Slovenia:
- a) take measures to draw to the attention of prosecutorial and judicial authorities on the importance of applying sanctions which are sufficiently effective, proportionate and dissuasive on natural and legal persons convicted for foreign bribery offences, in particular emphasising the importance of adequate economic sanctions (Convention, Article 3; Revised Recommendation, Section I);
 - b) either amend the waiver of punishment provision for cases where the briber reports solicitation by the official before the offence is discovered (*i.e.* for effective regret) in paragraph 3 of article 268 of the Criminal Code to ensure it does not contravene the Convention, or in some other appropriate way ensure that the law does not contravene the Convention, *e.g.* through issuing prosecutorial guidelines (Convention, Articles 1 and 3; Revised Recommendation, Section I);
 - c) either amend the waiver of punishment provision in paragraph 2 of article 11 of the Liability of Legal Persons for Criminal Offences Act to exclude its application to the offence of foreign bribery, or in some other appropriate way ensure that the law does not contravene the Convention, *e.g.* through issuing prosecutorial guidelines (Convention, Articles 1, 2 and 3; Revised Recommendation, Section I);
 - d) consider introducing a mechanism to exclude companies convicted of foreign bribery from performing ODA contracts (Convention, Article 3 Paragraph 4; Revised Recommendation, Section VI.iii).
7. With respect to the offence of money laundering, the Working Group recommends that Slovenia take measures for ensuring that it can effectively be enforced in cases where the predicate offence is foreign bribery regardless of the place where the bribery occurred; (Convention, Article 7; Commentary 28).

II. Follow-up by the Working Group

8. The Working Group will follow up the issues below, as practice develops, in order to assess:
- a) whether bribery of foreign public officials covers (i) bribery of employees of foreign public enterprises regardless of their legal form, including those under the indirect control of a foreign government(s), and (ii) bribery of persons exercising a public function for any organised foreign area or entity, such as an autonomous territory (Convention, Article 1; Commentaries 14 and 18);
 - b) whether interpretations of the term “insignificant” in article 28 of the Liability of Legal Persons for Criminal Offences Act (giving prosecutors the discretion not to initiate criminal proceedings against a legal person) unduly restrict the liability of legal persons (Convention, Article 2);
 - c) the criminal and administrative sanctions, in particular fines and confiscation, imposed on natural and legal persons for (i) foreign bribery, and (ii) accounting offences (Convention, Articles 3 and 8);
 - d) the application of the conditions laid down in paragraph 1 of article 11 of the Liability of Legal Persons for Criminal Offences Act (reducing a sentence against a legal person where the management or supervisory body reports the perpetrator) (Convention, Articles 3 and 8);

- e) the establishment of jurisdiction over legal persons when the offence takes place in part or wholly abroad (Convention, Article 4);
- f) whether the money laundering offence can effectively be prosecuted (i) in the absence of a prior conviction for the predicate offence of bribery, and (ii) where the perpetrator does not know from which specific offence the proceeds were derived (Convention, Article 7);
- g) whether the Convention in conjunction with the Code of Criminal Procedure will provide an adequate basis for extradition in the absence of an extradition treaty with another Party to the Convention (Convention, Article 10);
- h) whether the non-deductible expense provision in the Corporate Income Tax Act and Personal Income Tax Act can be applied comprehensively to all bribes contemplated under Article 1 of the Convention (1996 Recommendation, 1997 Revised Recommendation, section IV).

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South Africa (June 2010)

Based on its findings regarding South Africa's implementation of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to South Africa under Part 1; and (2) will follow up the issues in Part 2 when there is sufficient practice.

1. Recommendations

Recommendations for ensuring effective prevention and detection of foreign bribery

1. With respect to prevention, awareness raising and training activities, the Working Group recommends that South Africa:
 - a) Provide further training to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that can play an important role in preventing and detecting foreign bribery by South African companies active in foreign markets, including diplomatic personnel, tax inspectors, and trade promotion, export credit and development aid agencies [2009 Recommendation, Section III(i)]; and
 - b) Take further action, as appropriate in cooperation with business organisations and other civil society stakeholders, to improve awareness among companies, in particular small and medium sized companies active in foreign markets, of the legislation regarding foreign bribery, and the non tax-deductibility of bribes, and to advise and assist companies in their efforts to prevent foreign bribery [2009 Recommendation, Section III(i)].
2. With respect to the detection and reporting of suspected foreign bribery to the competent authorities, the Working Group recommends that South Africa:
 - a) Regularly inform South African officials, particularly those in diplomatic representations, the tax administration, and in trade promotion, export credit development aid, and other agencies involved with South African companies operating abroad, and relevant private sector employees, of their obligations under the PRECCA to report instances of foreign bribery, and encourage and facilitate such reporting [2009 Recommendation, Sections III(iv) and IX]; and
 - b) Take measures for enhancing and promoting its whistleblower protection mechanisms for public and private sector employees who report suspected acts of foreign bribery, in order to encourage them to report suspicions without fear of retaliation. [2009 Recommendation, Sections III(iv) and IX].
3. With respect to officially supported export credits, the Working Group recommends that South Africa (i) ensure that applicants requesting export credit support are made expressly aware of the foreign bribery offence and its legal consequences; (ii) put in place due diligence procedures to verify that applicants are not engaging in acts of bribery; (iii) adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits; and (iv) encourage the Export Credit Insurance Corporation of South Africa to take into consideration, in its decisions to grant

export credit support, internal controls, ethics and compliance programmes or measures in place in applicant companies [2009 Recommendation, Sections IX(i) and (ii), X.C(vi), and XII].

4. With respect to official development assistance (ODA), the Working Group recommends that South Africa (i) incorporate an anti-bribery declaration in its standard contract for ODA-funded projects; and (ii) encourage the African Renaissance and International Cooperation Fund to take into consideration, in its decisions to grant ODA funded contracts, internal controls, ethics and compliance programmes or measures in place in procuring companies [2009 Recommendation, Sections III(i), IX(i) and (ii), X.C(vi), and XI].
5. Regarding accounting and auditing, the Working Group recommends that South Africa:
 - a) Consider any appropriate increased role for business organisations and professional associations in the promotion of internal control development for small and medium size enterprises, in the event that the new regulations to implement the Companies Act 2008 eliminate the need for statutory audit for non-public interest entities [2009 Recommendation, Sections X.B. and C.];
 - b) Encourage South African companies to (i) further develop and adopt adequate internal controls, ethics and compliance programmes or measures, for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance in Annex II of the 2009 Recommendation; and (ii) make statements in their annual reports, or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those that contribute to preventing and detecting bribery [2009 Recommendation, Section X.C., and Annex II];
 - c) Consider extending (i) to additional companies, including all publicly traded companies, existing requirements to establish and maintain systems of internal controls; and (ii) to non-publicly traded companies, where appropriate, the requirement to establish corporate monitoring bodies, such as audit committees [2009 Recommendation, Section X.C.]; and
 - d) In consultation with relevant professional associations: (i) encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, in particular through guidelines and training for these professionals and through raising the awareness of the management and supervisory boards of the companies about these issues; and (ii) ensure that auditors making reports on suspected acts of foreign bribery to the law enforcement or regulatory authorities, reasonably and in good faith, are protected from legal action [2009 Recommendation, Section X.B. and Annex II].
6. With regard to money laundering and foreign bribery, ensure that the institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Financial Intelligence Centre, receive appropriate directives and training on the identification and reporting of information that could be linked to foreign bribery [Convention, Article 7].

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

7. Regarding the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that South Africa:
 - a) Ensure that sufficient resources are made available and that training is provided to relevant law enforcement authorities, including the South African Police Service, Directorate for

Priority Crime Investigation, and the National Prosecuting Authority, for the effective detection, investigation and prosecution of foreign bribery offences [2009 Recommendation, Sections II., III(ii), V, and Annex I, Paragraph D];

- b) Develop specialised investigators and prosecutors' to more effectively investigate and prosecute foreign bribery cases, and consider establishing a mechanism for the purpose of facilitating the sharing of information and coordination of prosecutions of foreign bribery cases among law enforcement authorities [2009 Recommendation, Sections II., III(ii), V, and Annex I, Paragraph D];
 - c) Take all necessary measures to ensure that foreign bribery allegations are promptly detected, investigated and prosecuted as appropriate, and to monitor and evaluate the performance of investigation and prosecution agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation or prosecution [2009 Recommendation, Sections II., III(ii), V, and Annex I, Paragraph D];
 - d) Make full use of the broad range of investigative measures available to South African investigative authorities, including special investigative techniques and access to financial information, in order to effectively investigate suspicions of foreign bribery [2009 Recommendation, Sections II, III(ii), V, and Annex I, Paragraph D];
 - e) Promptly proceed with clarification of the Prosecution Policy to ensure that all Article 5 considerations are respected in foreign bribery cases [Convention, Article 5];
 - f) Consider strengthening safeguards to ensure that the exercise of investigative and prosecutorial powers, in particular for the foreign bribery offence, is not to be influenced by considerations prohibited under Article 5 of the Anti-Bribery Convention, including with regard to decisions made by the National Director of Public prosecutions and other prosecutors of the National Prosecution Authority; and [Convention, Article 5]; and
 - g) Ensure (i) that when plea bargaining is used, it is an effective mechanism for the enforcement of the foreign bribery offence; and (ii) that prosecutors receive adequate training and resources to improve its effectiveness [Convention, Article 5, and 2009 Recommendation, Sections II, III.(ii) and V].
8. With respect to jurisdiction over the foreign bribery offence, the Working Group recommends that, South Africa take steps to ensure that Law enforcement authorities and the judiciary are aware of the full range of jurisdiction introduced by sections 35 of the PRECCA, in particular as regards legal persons [Convention, Articles 2 and 4].
9. With respect to mutual legal assistance and extradition, the Working Group recommends that, South Africa:
- a) Take all appropriate measures to ensure the provision of mutual legal assistance in foreign bribery cases without undue delay, and encourage law enforcement authorities to request mutual legal assistance to obtain and assess evidence available abroad of allegations of foreign bribery over which South Africa has jurisdiction [Convention, Article 9, and 2009 Recommendation, Sections III(ii) and XIII(iii)]; and

- b) Promptly proceed with the adoption of its Extradition Bill, with a view to ensuring that South Africa can provide extradition for foreign bribery, regardless of where the foreign bribery has been committed [Convention, Article 10].
10. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that South Africa take steps to ensure that:
- a) Police and prosecutors are adequately trained and made aware of the importance of effectively enforcing liability of legal persons for acts of foreign bribery, so that they will be better equipped and more proactive in investigating and prosecuting legal persons for foreign bribery offences, and in responding to credible allegations [Convention, Article 2, and 2009 Recommendation, Sections II, III.(ii), V. and IX]; and that
 - b) The penalties applied in practice are sufficiently effective, proportionate and dissuasive [Convention, Article 2 and 3, and 2009 Recommendation, Sections II, III(ii) and V].
11. Regarding the related money laundering offence, the Working Group recommends that South Africa maintain statistics on the predicate offences for money laundering, with a view to identifying cases where foreign bribery is a predicate offence [Convention, Article 7].
12. Regarding sanctions for foreign bribery, the Working Group recommends that South Africa:
- a) Maintain statistics in respect of sanctions for foreign bribery offences, to allow for an assessment of the effectiveness of sanctions in practice [Convention, Article 3];
 - b) Consider whether the integrated approach which exists in the context of the Specialised Commercial Crime Courts may be appropriate to ensure the effective investigation, prosecution and sanctioning of foreign bribery cases [Convention, Article 3, and 2009 Recommendation, Sections II, III(ii); and V];
 - c) Continue to make full use of the confiscation provisions available under the Prevention of Organised Crime Act (POCA) to freeze the bribe and proceeds of foreign bribery, and ensure that the evidentiary threshold necessary to apply for freezing orders under the POCA is not too high in practice [Convention, Article 3, and 2009 Recommendation, Sections II, III(ii); and V]; and
 - d) Draw the attention of prosecutors and judges to section 28 of the PRECCA, with a view to the possible endorsement of natural and legal persons convicted of foreign bribery offences on the Register for Tender Defaulters, and possible termination of their ongoing agreements with the South African National Treasury [Convention Article 3, and 2009 Recommendation, Section XI].

2. Follow-up by the Working Group

13. The Working Group will follow up the issues below as case law develops:
- a) The effect of the institutional rearrangement of law enforcement authorities on the investigation and prosecution of foreign bribery cases;
 - b) The issue of intent, to ensure that ignorance of the foreign bribery legislation cannot be relied on as a defence in a foreign bribery case;

- c) The application of section 5(2) of the PRECCA, to ensure that it does not restrict the foreign bribery offence to acts performed only in the state of the foreign public official receiving the bribe;
- d) The performance of law enforcement authorities, including the SAPS, the NPA, and other relevant agencies, with regard to foreign bribery allegations, and in particular with regard to decisions not to open or to discontinue investigations and, as appropriate prosecutions; [Convention, Article 5, and 2009 Recommendation, Sections II, III.(ii) and V].
- e) The application of territorial and nationality jurisdiction concerning offences committed in whole or in part abroad, to ensure that the South African authorities can take action against legal persons for bribery of foreign public officials, whether it is committed directly or through intermediaries (including related legal persons such as foreign subsidiaries) [Convention, Articles 2 and 3, and 2009 Recommendation, Sections II, III.(ii), V, and Annex I, Paragraphs B. and C.];
- f) The application in practice of the foreign bribery offence with respect to legal persons, including as concerns (i) the liability of parent companies for acts of bribery by intermediaries, including related legal persons, including subsidiaries abroad, (ii) the implications of the requirement that the foreign bribery offence be committed “in furthering or endeavouring to further the interests of that corporate body”, and (iii) the application of corporate liability to state owned and state controlled companies [Convention, Article 2, and 2009 Recommendation, Annex I, Paragraph C.]; and
- g) The implementation of the new provisions of the Companies Act 2008, after its entry into force in July 2010, in particular with regard to South Africa’s efforts to align accounting standards applicable in South Africa with existing international accounting standards [Convention, Article 8, 2009 Recommendation X].

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Spain (March 2006)

The Working Group notes Spain's recent efforts to prepare legislation with regard to the criminal liability of legal persons and appropriate sanctions, and encourages Spain to proceed as promptly as possible to prepare and adopt legislation in this regard. The Working Group also recognises the introduction in 2003 of certain possible accessory sanctions for legal persons. The Working Group notes, however, with significant concern, that as of the time of the on-site visit and as of the date of this report, Spain had not yet established full criminal or administrative liability of legal persons for the bribery of foreign public officials. The Working Group will evaluate the regime of liability and sanctions for legal persons for foreign bribery once it is adopted and once there has been sufficient practice.

Based on its findings regarding Spain's implementation of the Convention and the Revised Recommendation, the Working Group also (i) makes the following recommendations to Spain under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Spain:

- a) take additional measures, including further training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Spanish companies active in foreign markets, including trade promotion, export credit and development aid agencies and ensure that declarations required from applicants for support from CESCE provide for an undertaking that applies to bribery by persons acting on behalf of the applicant and/or exporter (Revised Recommendation, Paragraph I);
- b) take action to improve awareness among business organisations and companies of the legislation regarding foreign bribery and of the intention to enforce it, including promoting better coordination between Ministries and agencies responsible for legal and economic affairs for purposes of producing explanatory materials relating to foreign bribery (Revised Recommendation, Paragraph I);
- c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I).

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Spain:

- a) issue regular guidance to staff in Spanish embassies and commercial offices concerning the steps that should be taken where credible allegations arise, in the foreign press or elsewhere, that a Spanish company or individual has engaged in foreign bribery, and take measures to ensure the effective transmission of suspicions to prosecutors in Spain (Revised Recommendation, Paragraph I);
- b) facilitate the reporting of suspicions of foreign bribery to prosecutors, including by clarifying and publicizing the effect of art. 262 LECrim and considering steps to better protect from retaliatory action employees who make reports in good faith (Revised Recommendation, Paragraph I);
- c) continue to improve the applicable measures to require auditors to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and consider more effective measures than art. 262 LECrim to require auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities (Revised Recommendation, Paragraph V.B);
- d) modify and expand the treatment of politically exposed persons (PEPs) in the current money laundering prevention guidelines for credit institutions and in other relevant guidelines as appropriate, and ensure that the money laundering authorities have adequate resources to carry out their expanded duties effectively (Revised Recommendation, Paragraph I).

Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Spain:

- a) implement the decision of the Spanish authorities to attribute to the Anti-Corruption Prosecution Office (ACPO) the power to investigate and prosecute all foreign bribery cases other than minor cases without the need for a case-specific determination of special significance by the Attorney General of Spain (FGE), take additional measures to ensure that all significant foreign bribery allegations are investigated and continue to provide the necessary resources to investigators and prosecutors (Convention, Article 5; Revised Recommendation, Paragraph 1);
- b) reconsider the rule requiring that the suspect be informed during the initial investigation of foreign bribery allegations in light of its likely interference with the effectiveness of the investigation (Convention, Article 5; Revised Recommendation, Paragraph 1);
- c) take appropriate measures, such as increasing the applicable sanctions, to ensure that the statute of limitations applicable to all foreign bribery offences extends for an adequate period of time for the investigation and prosecution of the offence (Convention, Art. 6);
- d) clarify the law in order to remove uncertainty about whether foreign bribery cases are subject to trial by jury (Convention, Articles 5, 6; Revised Recommendation, Paragraph 1);
- e) take appropriate measures to improve the collection and dissemination of statistical information relevant to evaluating the fight against foreign bribery (Revised Recommendation, Paragraph I)

4. With respect to the offence of foreign bribery, the Working Group recommends that Spain:

- a) amend the law to ensure that the foreign bribery offences do not require recourse to foreign law for their application (Convention, Art. 1);
- b) take all necessary action to ensure that the following would constitute the basis for a foreign bribery offence: (i) all bribes to a foreign public official to affect the official's exercise of discretion; (ii) all bribes for an act or omission in relation to performance of official duties, regardless of whether it is offered to the official "in the exercise of his/her post"; and (iii) all bribes for acts or omissions in accordance with the official's duties other than small facilitation payments (Convention, Art. 1);
- c) clarify the definition of foreign public official and that art. 427 PC does not apply to the foreign bribery offences, and ensure that the law applies to bribes to foreign public officials composed of non-pecuniary benefits (Convention, Art. 1).

5. With respect to the liability of legal persons for foreign bribery, the Working Group recommends that Spain:

- a) amend the law to ensure that all legal persons can be held directly liable for bribery of foreign public officials (Convention Art. 2);
- b) exclude requirements of individual liability as a prerequisite for the liability of the legal person (Convention Art. 2).

6. With respect to sanctions for foreign bribery, the Working Group recommends that Spain:

- a) increase the criminal sanctions applicable to foreign bribery in order (i) to provide for effective, proportional and dissuasive sanctions in all cases, including in particular for bribery to obtain a favourable exercise of discretion; and (ii) to ensure that effective mutual legal assistance and extradition are not excluded by the level of applicable sanctions in any foreign bribery case (Convention, Art. 3(1));
- b) consider whether to increase available sanctions for foreign bribery cases involving significant amounts of money in order to achieve sanctions proportional to those for similar economic crime cases (Convention, Art. 3);
- c) eliminate mandatory reductions of sanctions for foreign bribery (i) in cases of solicitation; and (ii) in cases where the foreign public official does not carry out the unjust act (Convention, Art. 3(1));
- d) amend the law to provide that legal persons shall be subject to effective, proportional and dissuasive sanctions for foreign bribery, including fines or monetary sanctions (Convention Art. 2, 3);
- e) take practical measures to improve the flow of information to the authorities responsible for the administrative sanctions systems, in particular from the judicial authorities (Convention, Art. 3).

7. With respect to related accounting/auditing, money laundering and tax offences and obligations, the Working Group recommends that Spain take appropriate measures to make explicit the prohibition of the deduction for tax purposes of bribes paid to foreign public officials, incorporate training with regard to

foreign bribery and its tax treatment into the training plan for tax inspectors, and consider adapting existing Spanish translations of the OECD Handbook for Tax Examiners for use in Spain (Revised Recommendation, Paragraphs I, IV);

II. Follow-up by the Working Group

8. The Working Group will follow up on the issues below, as practice develops, in order to assess:
- a) the existence of territorial jurisdiction over foreign bribery cases committed partially in Spanish territory, and the interpretation of the notion of the "aggrieved party" in nationality jurisdiction cases (Convention, Art. 4);
 - b) the role of the FGE with regard to the prosecution of foreign bribery cases, including the impact of the rule requiring that the FGE grant extensions for prosecutorial investigations that last more than six months (Convention, Art. 5; Revised Recommendation, Paragraph I);
 - c) seizure and confiscation in foreign bribery cases, including any possible limiting effect of art. 431 PC (Convention, Art. 3).

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/28/35/36392481.pdf>

Report on progress since March 2006

<http://oecd.org/dataoecd/50/20/41370578.pdf>

Sweden (June 2005)

Based on its findings on Sweden's implementation of the Convention and the Revised Recommendation, the Working Group makes the recommendations to Sweden under Part 1 and will follow up the issues under Part 2 when there has been sufficient practice in Sweden.

I. Recommendations

Recommendations concerning Awareness-Raising, Prevention and Detection of Bribery of Foreign Public Officials

1. With respect to general measures to raise awareness of, to prevent and to detect bribery of foreign public officials, the Working Group recommends that Sweden:
 - a) continue efforts to make Swedish companies more aware of their exposure to solicitations of bribery by foreign public officials (Revised Recommendation I);
 - b) raise the awareness of the offence of bribery of a foreign public official among public officials, particularly those of the Swedish Export Credit Guarantees Board, the Swedish Export Credit Corporation and the National Board for Public Procurement (Revised Recommendations I and II.v).
2. With respect to the prevention and detection of bribery of foreign public officials in the arms export sector, the Working Group recommends that Sweden encourage the Swedish defence industry to develop strong anti-corruption measures, and ensure that the decision-making bodies for providing licenses for exporting military equipment and dual-use goods consider whether applicants have been involved in bribery as well as the level of risk of corruption in relation to arms procurement in the destination country (Revised Recommendations I and II.v).
3. With respect to the role of Swedish foreign representations, including embassy personnel, in preventing and detecting bribery of foreign public officials, the Working Group recommends that Sweden take further measures to increase the awareness of foreign representations of corruption issues and of the steps that should be taken where credible allegations arise that a Swedish company or individual has bribed, or taken steps to bribe, a foreign public official, including encouraging the reporting of such allegations to the competent authorities in Sweden (Revised Recommendation I).
4. With respect to the prevention and detection of bribery of foreign public officials in official development assistance (ODA), the Working Group recommends that:
 - a) the Anticorruption Regulation of May, 2001 of the Swedish International Development Agency should be amended to clarify that "corruption" includes the bribery of foreign public officials and that the identification of loss or damage is not necessary to report suspicions of bribery of foreign public officials, and
 - b) the competent authorities in ODA take steps to ensure an effective system for reporting suspicions of bribery of foreign public officials to law enforcement authorities in Sweden

and/or abroad (Revised Recommendation I).

5. With respect to the prevention and detection of bribery of foreign public officials through accounting and auditing, the Working Group recommends that Sweden should:

- a) require an auditor to report indications of a possible illegal act of bribery to the board of directors of the audited entity regardless of who within the company structure perpetrated the offence (Revised Recommendation V.B.(iii)); and
- b) consider requiring the auditor to report indications of a possible illegal act of bribery to the competent authorities regardless of (i) who within the company structure perpetrated the offence, (ii) whether the economic damage from the suspected crime has been compensated and other prejudicial effects of the action have been remedied, and (iii) whether the offence is considered of minor significance (Revised Recommendation V.B.(iv)).

6. With respect to the prevention and detection of bribery of foreign public officials through anti-money laundering measures, the Working Group recommends that Sweden analyse the reasons for the low number of investigations and prosecutions compared to the number of suspicious transaction reports, with a view to increasing the effectiveness of the money laundering reporting system for the purpose of detecting and preventing the offence of bribing a foreign public official (Convention, Article 7; Revised Recommendation I).

Recommendations Pertaining Investigation of Bribery of Foreign Public Officials

7. With respect to investigations of bribery of foreign public officials, the Working Group encourages Sweden to spontaneously share information regarding cases of bribery of foreign public officials with authorities in other countries, when such information might assist the receiving authority in initiating or carrying out an investigation, prosecution or judicial proceeding or lead to a request for mutual legal assistance (Revised Recommendations I, II.vii and VII.i).

Recommendations for Ensuring Effective Prosecution and Sanctioning of Bribery of Foreign Public Officials

8. With respect to the offence of bribing a foreign public official, the Working Group recommends that Sweden ensure that the notion of a foreign public official in Chapter 20, section 2 of the Penal Code covers all officials and agents, including those elected, of a public international organisation of which Sweden is not a member (Convention, Article 1(4)).

9. With respect to the liability of and sanctions for legal persons for bribery of foreign public officials, the Working Group:

- a) urges the Swedish government to complete as a matter of priority, its proposal for reforming the system of liability of legal persons, and recommends that this reform (i) review whether there are any legal or practical obstacles to imposing corporate fines, and (ii) increase the maximum fine for bribery of foreign public officials to an appropriate level, given the size and global importance of Swedish companies;
- b) recommends that Sweden ensure that confiscation of the bribe and the proceeds of bribery shall be applied in practice against legal persons as a sanction for bribery of a foreign public official; and
- c) recommends that Sweden draw to the attention of investigating, prosecutorial and judicial authorities (i) the mandatory nature of corporate fines and (ii) the application of corporate

finer to intentional crimes (Convention, Articles 2 and 3(2)).

10. With respect to the reversal of the rule of mandatory prosecution for the prosecution of bribery of a foreign public official, the Working Group recommends that Sweden issue guidelines to prosecutors clarifying that prosecution of bribery of foreign public officials is always required in the public interest subject only to the normal exceptions under Chapter 20, section 7 of the Code of Judicial Procedure, and take effective measures to bring these guidelines to the attention of all prosecutors (Convention, Article 5).

11. With respect to a decision of whether to prosecute a case of bribery of a foreign public official committed outside of Sweden, the Working Group recommends that Sweden consider the appropriateness of the requirement of government authorisations to prosecute such cases. Sweden is invited to compile relevant information to assist the Working Group in monitoring this issue (Convention, Article 5).

12. With respect to sanctions for bribery of foreign public officials, the Working Group:

- a) encourages the Swedish authorities to pursue their work in order to broaden the grounds for the confiscation of criminal proceeds, and recommends that Sweden draw the attention of the investigating, prosecutorial and judicial authorities to the importance of imposing confiscation on the bribers (Convention, Article 3(3));
- b) recommends that Sweden devise procedures to verify whether a participant in public procurement has been convicted of bribery of foreign public officials, and consider debarring legal persons subject to corporate fines for bribery of foreign public officials from participating in public procurement (Convention, Article 3(4); Revised Recommendations II.v and VI.ii); and
- c) recommends that the Swedish International Development Cooperation Agency (Sida) and Swedfund review the standard contracts that they use with their clients in order to ensure that they contain provisions that specifically prohibit the bribery of foreign public officials related to the contracts (Convention, Article 3(4); Revised Recommendation II.v and VI.iii).

2. Follow-up by the Working Group

13. The Working Group shall follow-up the following issues once there has been sufficient practice:

- a) The operation of the offence of bribery of foreign public officials, including (i) the criteria for determining when bribery is aggravated or simple, (ii) the operation of certain elements of the offence of bribery of foreign public officials, including the notion of “impropriety” (Convention, Article 1);
- b) Whether in practice legal or procedural obstacles are encountered in proceeding against the legal person where the natural person who bribes a foreign public official has not been proceeded against, or has not been convicted and/or sanctioned (Convention, Article 2);
- c) The level of sanctions and application of confiscation measures to offence of bribery of foreign public officials (Convention, Article 3);
- d) The application of nationality jurisdiction to the offence of bribing a foreign public official, in particular:
 - (i) the requirement of dual criminality and the obtaining of information through mutual legal assistance and other channels to establish dual criminality (Convention, Article 4(2)); and

- (ii) the application of sanctions to Swedish legal persons for the offence of bribery of foreign public officials where the offence takes place abroad and is perpetrated by a non-Swedish natural person¹⁶ (Convention, Article 2);
- e) The system for assigning cases and allocating resources in prosecutions and investigations of bribery of foreign public officials (Convention, Article 5);
- f) Whether and when the offences that cover the concept of money laundering apply where the predicate offence occurs abroad (Convention, Article 7); and
- g) The effectiveness in practice of mutual legal assistance for non-criminal proceedings against legal persons brought by other parties to the Convention (Convention, Article 9; Revised Recommendation II.vii).

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/20/8/35394676.pdf>

Report on progress since September 2005

<http://www.oecd.org/dataoecd/3/43/39905457.pdf>

¹⁶

The Working Group notes that the latter issue should also be monitored on a horizontal basis.

Switzerland (December 2004)

Consequently, on the basis of the Working Group's conclusions concerning Switzerland's application of the Convention and the revised Recommendation, the Working Group makes the following recommendations to Switzerland. In addition, the Working Group recommends that certain issues should be re-examined in the light of on-going case law and practice.

I. Recommendations

Recommendations to ensure the effectiveness of measures to prevent or detect the bribery of foreign public officials

1. With regard to awareness-building efforts to promote the OECD Convention and the offence of bribing a foreign public official under the anti-bribery provisions of Swiss law, the Working Group recommends that Switzerland:
 - a) Pursue and amplify its awareness-building efforts directed at the private sector, paying particular attention, in co-operation with the relevant economic players, to small and medium-sized enterprises operating internationally [Revised Recommendation, Articles I and V.C.i)].
 - b) Pursue its efforts to raise awareness within the public administration, paying attention in particular to cantonal and federal employees who could play a role in detecting and reporting acts of bribery [Revised Recommendation, Articles I and VI. ii)].
2. With respect to other preventive measures, the Working Group recommends that Switzerland:
 - a) Pursue its efforts to ensure greater transparency in corporate accounts and the independence of auditing bodies, and encourage the Swiss Institute of Certified Accountants and Tax Consultants to complete promptly the on-going process of amendment of auditing standards [Convention, Article 8; Revised Recommendation, Article V.A.iii); Annex to the Revised Recommendation, paragraph 7].
3. With regard to detection, the Working Group recommends that Switzerland:
 - a) Consider the establishment in federal legislation of a formal obligation for any federal authority, civil servant or public official, including those in charge of export credits, to report indications of a possible act of bribery to competent authorities, and engage consultations with the cantons so as to encourage them to institute a similar obligation in cantonal legislation where such an obligation is currently lacking. [Revised Recommendation, Article I].
 - b) Proceed, in accordance with Switzerland's expressed position, to the drafting of a circular for federal and cantonal tax authorities specifying the nature and tax aspects of the foreign bribery offence, so as to encourage detection of acts of bribery abroad, and to review disclosure rules to ensure that officials discovering suspicious facts report them to the competent judicial authorities [Revised Recommendation, Article IV].

- c) Examine measures to ensure effective protection for persons cooperating with enforcement authorities, and especially for employees who in good faith report suspected acts of bribery so as to encourage such persons to report them without fear of dismissal [Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6].
- d) Given the important role of the auditing of accounts in detecting suspicious transactions related to the bribery of foreign public officials, consider extending mandatory reporting obligations for auditors contained in the draft bill to amend the Code of Obligations, by establishing an express obligation for auditors to report to the prosecutorial authorities any evidence of possible corrupt practices by the entities whose accounts they audit in the event that the entities' executive bodies, after being duly advised, refrain from taking action [Revised Recommendation, Article V iv)].
- e) Raise the awareness of supervisory authorities about the importance of utilising the full range of available sanctions so as to punish more dissuasively any infringements of vigilance requirements established with regard to the fight against money-laundering and of the obligation to report suspected money laundering related to foreign bribery [Convention, Article 7; Revised Recommendation, Article I].

Recommendation to ensure effective prosecution of the offence of bribing foreign public officials and related offences

- 4. With regard to prosecution and sanctions, the Working Group recommends that Switzerland:
 - a) Pursue the efforts undertaken to bolster the effectiveness of the prosecution of offences relating to the bribery of foreign public officials, by considering measures to streamline the process of appeal with respect to mutual judicial assistance requests [Convention, Article 5 9; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 8].
 - b) In order to strengthen the overall effectiveness of sanctions for the offence of bribery of foreign public officials, consider, in the context of the amendment of the federal law on public procurement, the temporary or permanent disqualification from any public procurement of enterprises convicted of bribing foreign public officials, and consider a similar approach for export credits [Convention, Article 3.4; Revised Recommendation, Article II.v) and Article VI.ii)].

II. Follow-up by the Working Group

- 5. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:
 - a) With respect to the liability of legal persons, whether, taking into account the notion of defective organisation, the application of article 100quater of the Criminal Code provides for effective, proportional and dissuasive sanctions for foreign bribery [Convention Article 2, 3(1).]
 - b) Whether, recognising the positive efforts undertaken, Switzerland continues to make available to the prosecutorial authorities of the Confederation the necessary resources to ensure the effective enforcement of the offence of bribery of foreign public officials [Convention Article 5, Revised Recommendation, Art. I; Annex to the Revised Recommendation, paragraph 6].
 - c) Whether enforcement of Article 322^{septies} of the Criminal Code by the judicial authorities leads to: (i) a broad interpretation of the definition of the exercise of the official functions of a head of state; (ii) its application in cases involving solicitation by the foreign public official; and (iii) an

application of the notion of foreign public official that includes heads of state and a country's highest authorities [Convention, Article 1].

- d) The application of the notion of socially accepted practices, including the question of whether it is excluded from the scope of application of Article 322^{septies} of the Criminal Code in accordance with the opinion expressed by Switzerland [Convention, Article I].
- e) Whether, excluding the case of small facilitation payments, an official's acceptance of an improper advantage constitutes the basis for the offence of bribery [Convention, Article 1 (1)].
- f) Whether the current basis for territorial jurisdiction, in light of the rule that the commission in Switzerland by a foreigner of an act of instigation, authorisation or complicity in the bribery of foreign public officials committed by a foreigner is deemed to take place abroad, is sufficiently effective to combat the bribery of foreign public officials [Convention, Articles 4(1), 4(4)].

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/43/16/34350161.pdf>

Report on progress since February 2005

<http://www.oecd.org/dataoecd/7/60/38898790.pdf>

Turkey (December 2007)

The Working Group on Bribery appreciates the preparations made by the Turkish authorities for the Phase 2 on-site visit in May 2007, and the Turkish authorities' dedicated efforts to provide feedback and follow-up materials up to the date of the examination in the Working Group. The Working Group also appreciates the openness and professionalism of the Turkish authorities throughout the examination process in responding to questions from the lead examiners, and presenting the Turkish government's position regarding the implementation of the Convention.

However, the Working Group recommends a Phase 2bis examination of Turkey within one year of adoption of the Turkish Phase 2 Report for the following main reasons:

- a) Inadequate efforts of the Turkish authorities to secure the attendance of private sector and civil society representatives, depriving the Working Group of the perspectives that broad private sector and civil society participation would have afforded.
- b) Serious inadequacy of public awareness-raising activities on the foreign bribery offence by the Turkish government, which likely explains the lack of awareness and engagement on the part of the Turkish private sector concerning foreign bribery issues.
- c) Overall lack of priority in addressing the bribery of foreign public officials by Turkish companies, which, based on discussions at the on-site visit, appears to result from the general attitude articulated by some participants at the on-site visit that bribery in neighbouring countries where bribe solicitation seems to be common has to be accepted.
- d) Repeal of the liability of legal persons for the foreign bribery offence in 2005 with the enactment of the new Criminal Code, and its replacement with "special security measures" that are limited in scope and do not include monetary sanctions.
- e) The early dismissal of a foreign bribery investigation regarding allegations against a Turkish holding company, on grounds that raise substantive concerns in the Working Group.
- f) Two-year delay in responding to the allegations of illicit payments to the Iraqi government against 139 Turkish companies in the 2005 Final Report of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme.

The Working Group recommends a Phase 2bis on-site visit to give the Turkish authorities an opportunity to demonstrate progress on the above-mentioned issues. The Phase 2bis visit should include panels with a broad spectrum of relevant private sector and civil society representatives. Regarding substance, the visit should specifically focus on progress by the Turkish authorities in the following three areas: (i) raising public awareness of the Convention and the foreign bribery offence; (ii) the investigation and prosecution of foreign bribery cases, including an assessment of the reasons for terminating the investigation of one foreign bribery case that took place in a foreign country and the two-year delay in acting on the allegations against Turkish companies in the Independent Inquiry Committee's Final Report on the UN Oil-for-Food Programme; and (iii) the re-establishment of the liability of legal persons in compliance with Article 2 of the Convention.

In addition, based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Turkey, the Working Group (i) makes further recommendations to Turkey under Part 1, and (ii) will follow-up the issues under Part 2 where there has been sufficient practice in Turkey.

I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to general awareness raising and training activities to promote the effective implementation of the Convention and the 1997 Revised Recommendation, the Working Group recommends that Turkey:

- a) Urgently establish and implement awareness-raising programmes for (i) public officials, particularly those in contact with Turkish companies operating in foreign markets, including staff involved in official development assistance (ODA)-funded procurement contracting; and (ii) companies, including SMEs, that are active in sectors or geographic locations prone to corruption [Revised Recommendation, paragraphs I, II v) and VI iii)] ;
- b) Promptly raise awareness among its foreign representations, including embassy personnel, and ensure that foreign representations disseminate information to Turkish companies and individuals regarding the risks of foreign bribery [Revised Recommendation, paragraph I]; and
- c) Make further efforts to raise awareness of the non-tax deductibility of bribes to foreign public officials among tax officials, tax professionals and the private sector, as well as provide training to tax officials on the detection of such payments [Convention, Article 13; Revised Recommendation, paragraph IV; and 1996 Recommendation].

2. With respect to the general detection of foreign bribery and related offences, the Working Group recommends that Turkey:

- a) Issue specific instructions to its foreign representations, including embassy personnel, on the steps to take when credible allegations arise that a Turkish company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Turkey [Revised Recommendation, paragraph I];
- b) Provide training for staff involved in ODA-funded procurement contracting on detecting and reporting suspicions of foreign bribery [Revised Recommendation, paragraphs I, II v) and VI iii)];
- c) Strengthen measures to protect whistleblowers in the public and private sectors from retaliation and retribution by their employers [Revised Recommendation, paragraph I]; and
- d) Adopt as soon as possible the Draft Witness Protection Act currently before Parliament [Revised Recommendation, paragraph I].

3. Regarding the prevention of foreign bribery in relation to ODA-funded procurement contracting, the Working Group recommends that Turkey: (i) systematically include anti-corruption clauses in ODA-funded contracts; and (ii) consider establishing a mechanism for excluding individuals and companies previously involved in foreign bribery from participating in such contracting opportunities [Revised Recommendation, paragraphs I, II v) and VI iii)].

4. With respect to the prevention and detection of foreign bribery through the tax system, the Working Group recommends that Turkey: (i) introduce an express denial of deductibility of bribe payments in the tax law or through another appropriate mechanism that is binding and publicly available; (ii) provide training to tax officials on the detection of bribe payments disguised as legitimate allowable expenses; and (iii) continue to include in existing and future tax treaties the Commentary to article 26(2) of the OECD Model Tax Convention, allowing for the reciprocal sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities in relation to corruption offences [Convention, Article 13; Revised Recommendation, paragraph IV; and 1996 Recommendation].

5. Concerning the prevention and detection of foreign bribery through systems for accounting and auditing and internal controls, the Working Group recommends that Turkey:

- a) Strengthen efforts to encourage companies including SMEs operating in foreign markets to adopt internal company controls, including codes of conduct and where appropriate ethics committees, specifically addressing foreign bribery [Revised Recommendation, paragraph V C]; and
- b) Broaden the scope of private companies subject to an external audit to include certain non-listed companies that operate in foreign markets, and broaden the scope of public entities subject to a state audit to include state-owned and controlled companies not subject to an external audit, and agencies involved in official export credit support, public procurement, privatisation, and ODA-funded procurement contracting [Revised Recommendation, paragraphs I and V B].

6. Regarding the prevention and detection of foreign bribery through the anti-money laundering system, the Working Group recommends that Turkey [Convention, Article 7]:

- a) Promptly issue the regulation submitted to the Prime Minister's Office for Issuance of a Council of Ministers' Decree establishing suspicious transactions reporting (STR) obligations for accountants and lawyers;
- b) Promptly issue the regulation drafted by MASAK requiring the provision of feedback to parties that make STRs, and provide improved guidance to reporting parties in the form of up-to-date money laundering typologies where the predicated offence is the bribery of foreign public officials;
- c) Assess the reasons for the low number of STRs made to MASAK.

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

7. Concerning the investigation and prosecution of foreign bribery offences, the Working Group recommends that Turkey [Convention, Article 5] intensify and ensure regular training on foreign bribery for the investigative authorities, prosecutors and members of the judiciary.

8. Concerning the requirement under article 13(2) of the Criminal Code that the Minister of Justice request the application of "universal jurisdiction" in the specific case where bribery of a foreign public official is committed by a Turkish national or company abroad, the Working Group recommends that Turkey either: (i) eliminate this requirement; or (ii) ensure that the Minister's discretion for requesting such application shall not be influenced by political interests including "the national economic interest, the political effect upon relations with another State or the identity of the natural or legal persons involved" [Convention, Articles 4.2 and 5].

9. Regarding the implementation of the offence of bribing a foreign public official under article 252.5 of the new Turkish Criminal Code, the Working Group recommends that Turkey repeal the application of “effective remorse”, which has the effect of releasing an offender from liability for a penalty, to the foreign bribery offence [Convention, Article 1].

10. With respect to Turkey’s repeal of the liability of legal persons for the foreign bribery offence, the Working Group recommends that Turkey urgently re-establish such liability in compliance with Article 2 of the Convention [Convention, Articles 2 and 3.2].

11. Regarding sanctions for the foreign bribery offence, the Working Group recommends that Turkey:

- a) Encourage prosecutors to seek confiscation upon conviction in foreign bribery cases whenever appropriate [Convention, Article 3.3];
- b) Maintain more detailed statistics on sanctions applied in domestic and foreign bribery cases [Convention, Article 3]; and
- c) Consider taking appropriate measures to exclude companies and natural persons convicted of foreign bribery from participating in privatisations, public procurement and ODA-funded public procurement contracting [Convention, Article 3.4; Revised Recommendation, paragraph II v)].

12. Regarding fraudulent accounting offences, the Working Group recommends that Turkey: (i) ensure that the penalties imposed for such offences are effective, proportionate and dissuasive; and (ii) compile more detailed statistics on the sanctions imposed for such offences, particularly those under article 359 of the Tax Procedure Code [Convention, Article 8; Revised Recommendation, paragraph V A iii)].

II. Follow-Up by the Working Group

13. The Working Group will follow-up the issues below, as practice develops:

- a) Procedures for combating foreign bribery by Türk Eximbank, including mechanisms for excluding individuals and companies with prior involvement in foreign bribery from participating in official export credit support contracting [Revised Recommendation, paragraphs I and II v)].
- b) The investigation of foreign bribery cases, including with regard to: (i) the sharing of competence between the Department of Anti-Smuggling and Organised Crime and the Public Order Department; and (ii) the absence of police authority to undertake an investigation except upon request of the public prosecutors;
- c) The number of investigations and prosecutions of the offence of money laundering;
- d) Developments regarding whether the following situations are effectively covered by the foreign bribery offence:
 - i. Bribery to obtain an abuse of discretion, and bribery to obtain an act or omission that goes beyond the foreign public official’s authority;
 - ii. “Simplified” bribery (i.e. bribery to ensure the performance or non-performance of a task);

- iii. Bribery where an agreement is reached between the briber and the foreign public official to transmit the bribe directly to a third party, such as a family member, political party or charity; and
 - iv. The person bribed exercises a public function for a foreign country or a public international organisation, but has not been appointed or elected or is not holding a legislative, executive or judicial office (e.g. an employee involved in awarding public procurement contracts); and
- e) Sanctions imposed in foreign bribery and money laundering cases [Convention, Articles 3 and 7].

PHASE 2bis

The Working Group recognises that Turkey has made serious efforts to improve compliance with the Convention since the Phase 2 examination in December 2007, and believes that the Phase 2bis examination process has helped Turkey to increase the priority of the Convention. Pursuant to the Phase 2 Recommendation of the Working Group, the purpose of the Phase 2bis evaluation of Turkey was to assess progress concerning the following: (1) awareness-raising by the Turkish Government; (2) investigating and prosecuting allegations of bribing foreign public officials; and (3) re-instating the liability of legal persons. In addition, due to inadequate participation of the private sector and civil society in Phase 2, the on-site visit to Turkey was to provide a second chance for the examination team to meet with a broad spectrum of representatives from these areas, to discuss a variety of issues including awareness, and corporate liability.

The Phase 2bis on-site visit to Turkey by the examination team in January 2009 was successful in a number of areas. The team met with representatives from 30 companies and 14 business associations – the highest level of private sector participation so far in any Phase 2 or Phase 2bis on-site visit. These representatives largely demonstrated a high level of awareness of the prohibition in Turkish criminal law against the bribery of foreign public officials; although as in many Parties to the Convention, awareness amongst small and medium-sized enterprises was lagging. Progress in investigating cases was observed, in particular following the on-site visit, including the re-opening of an investigation that had been terminated at the time of the Phase 2 examination, and the opening of a new investigation. Work had also progressed on the allegations against 139 Turkish companies in the 2005 Final Report of the Independent Inquiry Committee into the Oil-for-Food Programme (IIC Final Report). Moreover, in January 2009, a draft law was introduced in Parliament to establish the liability of legal persons in the Turkish Code of Misdemeanours for the offence of bribing a foreign public official.

Nevertheless, the Working Group has two principle remaining areas of concern. First, Turkey will continue to be in non-compliance with Article 2 of the Convention on the liability of legal persons as long as the current situation continues. Second, the Working Group believes that progress investigating transnational bribery cases may have been impeded as follows: (1) the allegations in the 2005 IIC Final Report were not given sufficient priority, at least before March 2009; (2) in one case, the public prosecutors' office has not applied coercive investigative measures while waiting for a response to a limited MLA request, because the Turkish authorities believe that the level of suspicion is not high enough to be sure that jurisdiction can be applied in Turkey; and (3) inspection boards, which are not law enforcement bodies and do not have the authority to apply coercive investigative measures, were, until after the Phase 2bis on-site visit, being used to collect information needed to open a criminal investigation of the bribery of foreign public officials in a second case, even though a foreign court document raised sufficient suspicions of the bribery of a foreign public official.

In view of these remaining concerns, the Working Group makes the following recommendations to Turkey:

1. Recommendations

Recommendation on the investigation of allegations of transnational bribery

1. Regarding allegations of transnational bribery, the Working Group recommends that Turkey:
 - a) report in detail in its Phase 2 written follow-up report, which is due in December 2009, on progress in the two ongoing investigations and the United Nations Oil-for-Food Program cases, and continue to inform the Working Group on developments in these cases, for instance, during the Working Group's tour de table;
 - b) maintain contact with the UN Office of Legal Affairs as necessary to ensure the timely receipt of the requested information on allegations in the IIC Final Report concerning Turkish companies, and to discuss the authentication of documentary evidence if necessary following receipt of the relevant information; and
 - c) ensure the effective investigation and prosecution of foreign bribery cases by assessing the level of suspicion necessary to open a criminal investigation of such cases, and by limiting the use of inspection boards in foreign bribery cases to assisting the public prosecutors' office in ongoing investigations and collecting information needed to open a criminal investigation when there is not a sufficient suspicion for the public prosecutors' office to open an investigation.

Liability of legal persons

2. Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group:
 - a) restates the Phase 2 Recommendation to "urgently" re-establish the liability of legal persons in conformity with Article 2, and further recommends that Turkey consider the comments in this report on areas of the Draft Bill on the liability of legal persons that might not comply with the Convention, and those areas that might be an impediment to the effectiveness of the liability of legal persons; and
 - b) recommends that once a new law comes into force re-establishing the liability of legal persons for the bribery of foreign public officials, the law undergo a peer review analysis in conjunction with Turkey's Phase 2 written follow-up report, which is due to be given in December 2009, assuming that the law will have been passed by then.

Awareness

3. Regarding efforts by the Turkish Government to raise the awareness of the private sector on the Convention and the offence of bribing a foreign public official, the Working Group recommends that Turkey, while sustaining its recent efforts and providing follow-up where appropriate such as through a mechanism for companies to ask questions about information provided by the Government, increase its awareness-raising efforts vis-à-vis small and medium enterprises, including through collaboration with business associations that represent SMEs.¹⁷

¹⁷ The lead examiners note that the need to increase the awareness of SMEs is a horizontal issue affecting many Parties to the Convention.

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/13/46/39862163.pdf>

Complete Phase 2bis Report available at:

<http://www.oecd.org/dataoecd/2/18/43198860.pdf>

Report on progress since Phase 2 and Phase 2 bis reports:

<http://oecd.org/dataoecd/47/16/44866155.pdf>

United Kingdom (March 2005; Phase 2bis: October 2008)

The Working Group is appreciative of the hard work of the United Kingdom in preparing and hosting the on-site visit, and of their efforts to provide information throughout the examination process.

In the Phase 1 bis report the Working Group took note that the United Kingdom authorities had confirmed their government's commitment to pursuing the wider reform of corruption law, and that Part 12 of the Anti-Terrorism, Crime and Security Act 2001 would be repealed and replaced as a part of that reform. The Working Group recommended at that time that the United Kingdom proceed at the earliest opportunity to enact a comprehensive anti-corruption statute.

The Working Group notes that since Phase 1 bis the United Kingdom has not enacted any new foreign bribery statute. The Working Group therefore recommends that the United Kingdom enact at the earliest possible date comprehensive legislation whose scope clearly includes the bribery of a foreign public official. The Working Group will conduct an evaluation of the new law when it comes into force, and reserves the right to conduct a further on-site evaluation of the United Kingdom on the application in practice of the new law.

The Working Group notes that no company or individual has been indicted or tried for the offence of bribing a foreign public official since the ratification of the Convention by the UK.

Based on its findings regarding the United Kingdom's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the following recommendations to the United Kingdom under part I, and (ii) will follow up the issues in part II when there is sufficient relevant practice.

I. Recommendations

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

1. With respect to awareness raising activities to promote the implementation of the Convention and the foreign bribery offence relating to bribery and corruption and amending the Prevention of the Corruption Acts 1889 to 1916, the Working Group recommends that the United Kingdom:

- a) enhance existing efforts to raise awareness of the Convention and the foreign bribery offence among law enforcement authorities including the Police, judicial authorities and UK public officials involved with UK companies operating abroad. [Revised Recommendation, Paragraph I;
- b) undertake further public awareness activities for the purpose of increasing the level of awareness of the Convention and the foreign bribery offence among trade unions and small and medium sized enterprises (SMEs) doing business internationally [Revised Recommendation, Paragraph I];
- c) take appropriate measures to publicise, including in all explanatory material distributed to UK companies, the conditions under which parent and affiliate companies can be liable in

connection with foreign bribery, and encourage UK companies to report to UK authorities, as well as to other appropriate authorities, instances of foreign bribery they come across in the course of their operations [Revised Recommendation, Paragraph I].

2. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that the United Kingdom:

- a) establish a clear obligation for civil servants to report possible instances of bribery to the relevant authorities [Revised Recommendation, Paragraph I];
- b) in applying its legislation in the field of whistleblowing, improve protection of persons who report directly to law enforcement authorities; and pursue its efforts to make such measures more widely known among companies and the general public [Revised Recommendation, Paragraph I].

3. With respect to the prevention and detection of foreign bribery, the Working Group recommends that the United Kingdom:

- a) proceed diligently with the adoption of reforms clarifying and unifying the UK accounting legislation with the International Accounting Standards, to ensure the fraudulent accounting offence is in full conformity with Article 8 of the Convention [Convention, Article 8; Revised Recommendation, Paragraph V.A.];
- b) proceed with the adoption of guidance for auditors in order to explain and clarify their reporting obligation concerning possible acts of foreign bribery [Revised Recommendation, Paragraphs I, V.B.(iii) and V.B.(iv)];
- c) ensure sufficient time and resources are available to tax authorities to review tax information and allow for the detection of possible criminal conduct, including foreign bribery offences [Revised Recommendations, Paragraph I and IV].

Recommendations for ensuring adequate mechanisms for the effective investigation and prosecution of offences of bribery of foreign public officials and related offences

4. With respect to investigation, the Working Group recommends that the United Kingdom:

- a) ensure that the role of the Serious Fraud Office (SFO) in foreign bribery investigations is confirmed and that appropriate human and financial resources are provided, and consider monitoring and evaluating the performance of the SFO and other relevant agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation [Convention, Article 5; Revised Recommendation, Paragraph I];
- b) amend the Memorandum of Understanding to clarify that the Ministry of Defence Police's investigative jurisdiction is limited to cases where the Ministry of Defence is a party to the contract [Convention, Article 5; Revised Recommendation, Paragraph I];
- c) reconsider obligations in the Memorandum of Understanding specific to foreign bribery investigations requiring disclosure of information about the investigation to non-investigatory government departments (notably the Foreign and Commonwealth Office and the Ministry of Defence) [Convention, Article 5; Revised Recommendation, Paragraph I];

- d) increase resources for the prompt and effective handling of mutual legal assistance requests [Convention, Articles 9 and 10; Revised Recommendation, Paragraphs II.vii and VII].
5. With respect to prosecution, the Working Group recommends that the United Kingdom:
- a) amend where appropriate the Code for Crown Prosecutors, the Crown Prosecution Service Manual and other relevant documents to ensure that the investigation and prosecution of bribery of foreign public officials shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved [Convention, Article 5];
 - b) in light of the longstanding absence of any consent requirement for the common law bribery offence, consider the appropriateness of Law Officers consent for cases of foreign bribery [Convention, Article 5; Revised Recommendation, Paragraph I];
 - c) broaden the level of persons engaging the criminal liability of legal persons for foreign bribery offences [Convention, Article 2].
6. With respect to Crown Dependencies and Overseas Territories, the Working Group recommends that the United Kingdom, within the rules governing their relationship:
- a) verify compliance of Guernsey's new legislation with the OECD Convention, invite the Jersey authorities to enact a comprehensive anti-corruption statute at the earliest possible date in order to extend the OECD Convention to the islands [Convention, Article 1];
 - b) continue to encourage the Overseas Territories to adopt the necessary legislation in line with the principles of the Convention and Revised Recommendation, and support them in their efforts [Convention, Article 1].
7. With respect to sanctions, the Working Group recommends that the United Kingdom:
- a) consider adopting a regime of additional administrative or civil sanctions for legal persons that engage in foreign bribery [Convention, Article 3];
 - b) considers revisiting the policies of agencies such as Department for International Development and Export Credit and Guarantees Department on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrence [Revised Recommendation, Paragraph I and Paragraph VI (iii)];
 - c) encourage prosecutors to actively pursue the necessary procedures for confiscation in all appropriate foreign bribery cases [Convention, Article 3].

II. Follow-up by the Working Group

8. The Working Group will follow-up on the issues below, as practice develops, in order to assess:
- a) the application of sanctions with a view to determining whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, in particular, the practice of the courts with regard to the criminal liability of legal persons for the offence of active bribery of foreign public officials [Convention, Articles 2 and 3];

- b) the effectiveness of the investigations carried out by the Ministry of Defence Police in relation to foreign bribery offences in defence contracts [Convention, Article 5 ; Revised Recommendation, Paragraph I];
- c) with respect to money laundering, the application of the new provisions under the Proceeds of Crime Act 2002, particularly with respect to the application of offences of failure to report, the levels of sanctions in practice, and the efforts made to raise awareness and elaborate guidelines/typologies covering foreign bribery offences [Convention, Article 7; Revised Recommendation, Paragraphs II.(i) and III];
- d) the application in practice of the territorial and nationality jurisdiction for foreign bribery offences, given the absence of cases to date regarding the establishment of jurisdiction over offences that have taken place wholly or substantially abroad [Convention, Article 4];
- e) the possible effect of the tendency to simplify cases and to use alternative charges on the implementation of the Convention in the UK [Convention, Article 5; Revised Recommendation, Paragraph I];
- f) the application of the evidentiary threshold for providing mutual legal assistance and extradition. In this respect the UK should compile quantitative information to assist the Working Group in its follow-up assessment [Convention, Article 9];
- g) the recent changes of the ECGD procedures to combat bribery and corruption with regard to any weakening of the rules that could reduce the ability of the ECGD to detect and prevent foreign bribery [Revised Recommendation, Paragraph I and Paragraph VI (iii)].

PHASE 2BIS

The Working Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK. The continued failure of the UK to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations. The Working Group reiterates its previous 2003, 2005 and 2007 recommendations that the UK enact new foreign bribery legislation at the earliest possible date. The Group also strongly regrets the uncertainty about the UK's commitment to establish an effective corporate liability regime in accordance with the Convention, as recommended in 2005, and urges the UK to adopt appropriate legislation as a matter of high priority.

The Working Group recognises that the UK government has taken some measures to strengthen the fight against foreign bribery and notes a first conviction in September 2008 for foreign bribery in international business transactions. It also notes the recent UK anti-corruption strategy to improve and strengthen the UK's law and structures to tackle foreign bribery. Reforms are urgently needed and should be dealt with as a matter of political priority.

The Working Group understands that the Law Commission will deliver its final report in November 2008 and that the Government will publish a draft bill for pre-legislative scrutiny early next year. The Working Group expects that a bill be introduced in Parliament in 2009.

The Working Group's priority is indeed to ensure that the UK will enact new legislation on foreign bribery which is effective and comprehensive (including on liability of legal persons). In this context, the Working Group will seek to confer with the Law Commission about this Report and the concerns raised

therein prior to the Commission's publication of its report. In addition, the Group welcomes the invitation of the UK government to discuss the content of the Law Commission report soon after its publication in order to fully apprise the UK of the views of the Working Group before a draft bill is submitted for pre-legislative scrutiny. The modalities of such discussion will need to be agreed between the United Kingdom and the Management Group.

In addition, in light of the numerous issues of serious concern, the Working Group requests the UK to provide a written report on legislative progress at each Working Group meeting and reserves the right to carry out follow-up visits to the UK as it deems appropriate. The Working Group may also take further appropriate action after it considers the reports or any on-site visits.

The Working Group stresses that failing to enact effective and comprehensive legislation undermines the credibility of the UK legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral Development Banks.

In light of the above and based on its findings regarding the UK's implementation of the Convention and the Revised Recommendation, the Working Group also (i) makes the following recommendations to the UK under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

Part I. Recommendations

1. Regarding the offence of foreign bribery, the Working Group recommends that the UK:
 - a) enact effective and modern foreign bribery legislation in accordance with the Convention at the earliest possible date and as a matter of high priority (Convention Article 1);
 - b) ensure, in particular, that such legislation does not permit principal consent as a defence to foreign bribery and criminalises extraterritorial foreign bribery committed through an intermediary who is not a UK national (Convention Article 1).
2. Regarding the liability of legal persons, the Working Group recommends that the UK adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery (Convention Articles 2 and 3).
3. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that the UK:
 - a) satisfy the Working Group, by enacting legislation or otherwise, that it has established a broad territorial basis for jurisdiction that does not require an extensive physical connection to the bribery act (Convention Article 4(1));
 - b) enact legislation to establish, for foreign bribery cases, nationality jurisdiction over legal persons incorporated in the Crown Dependencies and Overseas Territories (Convention Article 4(2)).
4. Regarding the application of Article 5, the Working Group recommends that the UK:
 - a) take all necessary measures to ensure that Article 5 applies effectively to investigators and prosecutors at all stages of a foreign bribery investigation or prosecution, and in respect of all investigative and prosecutorial decisions including those made by the SFO, police and Attorney General (Convention Article 5);

- b) ensure that all relevant parts of the government are fully aware of their duty to respect the principles in Article 5 so that they can assist investigators and prosecutors to act in accordance with that Article (Convention Article 5).

5. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that the UK:

- a) ensure that the Attorney General's superintendence role does not include the power to give directions to the Director in individual foreign bribery cases, and eliminate the statutory requirements for the Attorney General to consent to prosecutions of foreign bribery (Convention Article 5; Revised Recommendation Paragraphs I and II);
- b) take steps to ensure that the SFO can obtain access to information that may be relevant to a foreign bribery investigation and which is held by the National Audit Office, tax authorities in the Crown Dependencies and Overseas Territories, and other UK government agencies (Revised Recommendation Paragraphs I and II);
- c) include the foreign bribery offence within the scope of the current reform efforts to make its system of plea bargaining more effective (Revised Recommendation Paragraphs I and II);
- d) improve the ability of the Crown Dependencies and Overseas Territories to provide MLA to the UK, including by eliminating formal requirements and increasing the available resources; ensuring that the Overseas Territories adopt, and encouraging the Crown Dependencies to adopt, foreign bribery legislation, and analysing the causes of delay (Convention Article 9; Revised Recommendation Paragraphs I, II.vii and VII);
- e) consider re-opening the Al Yamamah investigation if the UK were satisfied that the circumstances that led to the decision to discontinue the investigation sufficiently changed (Convention Article 5).

6. Regarding resources for foreign bribery cases, the Working Group recommends that the UK ensure that the SFO and the relevant investigative agencies have sufficient human and financial resources so as to carry out their role effectively in foreign bribery cases (Revised Recommendation Paragraphs I and II).

7. Regarding export credits, the Working Group recommends that Export Credits Guarantee Department (ECGD):

- a) in any case where a criminal investigation into a transaction supported by ECGD has been blocked for reasons other than on the merits, make vigorous use of all of its powers, including notably its audit powers, to investigate whether the transaction involves foreign bribery (Convention Article 3(4), Revised Recommendation Paragraph I);
- b) review its general contracting policies for future transactions to address policy issues raised by cases that cannot be investigated by criminal law enforcement authorities (Convention Article 3(4), Revised Recommendation Paragraph I).

Part II. Follow-up by the Working Group

8. The Working Group will follow up on the issues below, as practice develops, in order to assess:

- a) the rules for appointing and removing the SFO Director, and the powers of the Attorney General and SFO Director in foreign bribery cases (Convention Article 5; Revised Recommendation Paragraphs I and II);
- b) the results of the UK's continuing active review of the disclosure regime for prosecutors in complex commercial cases as they apply to foreign bribery and the need for resources in such cases (Revised Recommendation Paragraphs I and II);
- c) the use of co-operative witnesses and deferred prosecution of companies in foreign bribery cases (Revised Recommendation Paragraphs I and II).

Complete Phase 2 Report available at:

<http://www.oecd.org/dataoecd/62/32/34599062.pdf>

Report on progress since March 2005

<http://www.oecd.org/dataoecd/43/13/38962457.pdf>

Complete Phase 2*bis* Report available at:

<http://www.oecd.org/dataoecd/23/20/41515077.pdf>

United States (October 2002)

In conclusion, based on the findings of the Working Group with respect to the United States' application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to the United States. In addition, the Working Group recommends that certain issues be revisited as the case-law continues to develop.

I. Recommendations

Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

1. With respect to awareness raising to promote the implementation of the FCPA, the Working Group recommends that the United States:
 - a) Enhance existing efforts to reach small and medium sized enterprises doing business internationally, both in order to raise the level of their awareness of the FCPA and to equip them with tools and information which are specifically tailored to their needs and resources. (Revised Recommendation, Article 1)
 - b) Undertake further public awareness activities for the purpose of increasing the level of awareness of the FCPA in the accounting profession. (Revised Recommendation, Article 1)
2. With respect to other preventive measures, the Working Group recommends that the United States, based on the expertise built up during years of applying and interpreting the FCPA:
 - a) Consider issuing public guidance, whether as guidelines or otherwise, suitable to assist businesses in complying with the FCPA generally, and in particular to equip them with risk management tools useful in structuring international transactions. (Revised Recommendation, Article 1)
 - b) Consider developing specific guidance in relation to the facilitation payments exception (Convention, Commentary 9; Phase 1 Evaluation, paragraph 1.3).
 - c) With respect to the defence of reasonable and bona fide expenditure, there were questions raised concerning the need for this defence. If it is to be maintained, the Working Group recommends that appropriate guidance be provided. (Phase 1 Evaluation, paragraph 1.3).
3. The Working Group further recommends that the United States:
 - a) Encourage the development and adoption of compliance programs tailored to the needs of SMEs doing business internationally. (Revised Recommendation, Article V. C (i))
 - b) Consider making the books and records provisions of the FCPA applicable to certain non-issuers based on the level of foreign business they transact, so as to possibly improve the level of deterrence and detection of FCPA violations. (Convention, Article 8; Revised Recommendation, Article V)

4. With respect to detection, the Working Group recommends that the United States:
 - a) Advocate clarification of auditing standards especially as to materiality, and strengthen controls over auditors in order to enhance the detection of foreign bribery. (Convention, Article 8; Revised Recommendation, Article V)
 - b) Undertake to maintain statistics as to the number, sources and subsequent processing of allegations of FCPA violations in order to put in place measures to enhance the capabilities of the United States in detecting foreign bribery. (Revised Recommendation, Article 1; Annex to the Revised Recommendation, paragraph 6)

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Accounting and Money Laundering Offences

5. The Working Group recommends that the United States:
 - a) Make a clear public statement, in the light of the OECD Convention, identifying the criteria applied in determining the priorities both of the Department of Justice and of the Securities and Exchange Commission in prosecuting FCPA cases. (Convention, Article 5)
 - b) Enhance the existing organisational enforcement infrastructure by setting up a mechanism, including the compilation of relevant statistics, for the periodic review and evaluation of the overall FCPA enforcement effort (Convention, Article 5).
 - c) Consider whether more focus should be given to criminal prosecutions in the framework of anti-money laundering legislation for failure to report suspicious activity, to enhance the overall effectiveness of the FCPA. (Convention, Article 7)
 - d) Consider whether the statute of limitations applicable to the offence of bribery of a foreign public official, as well as to other criminal offences involving the obtaining of evidence located abroad, allows for an adequate period of time for the investigation and prosecution of the offence, and if necessary, take steps to secure an appropriate increase in the period. (Convention, Article 6)
 - e) Consider amendments to the FCPA to clarify that it is an offence to offer, promise or give a bribe “in order to obtain or retain business or other improper advantage in the conduct of international business”. (Convention, Article 1; Phase 1 Evaluation, paragraph 1.4)

II. Follow-up by the Working Group

6. The Working Group will follow up the issues below, as the case-law continues to develop, to examine:
 - a) Whether amendments are required to the FCPA to supplement or clarify the existing language defining the elements of the offence of foreign bribery with regard to (i) cases where a benefit is directed to a third party by a foreign official; and (ii) the scope of the definition of a “foreign public official”, in particular with respect to persons holding judicial office and the directors, officers and employees of state-controlled enterprises or instrumentalities (Convention, Article 1; Phase 1 Evaluation, paragraphs 1.2)

b) Whether the current basis for nationality jurisdiction, as established by the 1998 amendments to the FCPA, is effective in the fight against bribery of foreign public officials (Convention, Article 4)

7. The Working Group will furthermore monitor developments in the following area:

a) Whether, by November 2002, the base level offence classification of foreign bribery for sentencing purposes has been increased so that penalties are comparable to those applicable to domestic bribery (Convention, Article 3; Phase 1 Evaluation, paragraph 2.1).

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<http://www.oecd.org/dataoecd/52/19/1962084.pdf>

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